From: Employment Law360
To: Ring, John
Subject: State Of The States: New Employment Laws So Far In 2019
Date: Monday, April 1, 2019 3:36:52 AM

EMPLOYMENT

Monday, April 1, 2019

TOP NEWS

Analysis

State Of The States: New Employment Laws So Far In 2019

Three states adopted laws in the first quarter of 2019 to incrementally boost their minimum wages to $15 an hour — including Maryland, which became the sixth state overall to move toward a $15 wage floor when legislators overrode a gubernatorial veto. Here, Law360 looks at these and other notable state employment statutes that have been passed so far this year.

Read full article »

Analysis

NJ Limits On Harassment NDAs Could Crush Burdened Courts

New Jersey's new law barring mandatory secret deals to resolve workplace harassment claims could all but wipe out once common settlements and spur many more employees to take their cases all the way to trial, spawning litigation that would grind down the Garden State's already encumbered courts, experts said.

Read full article »

Fed. Circ. Wants Reasons For EEOC Mediator's Fee Denial

The Federal Circuit told an arbitrator to reconsider denying fees to a U.S. Equal Employment Opportunity Commission mediator whose firing for a violent outburst the arbitrator reversed, directing him to explain his ultimate decision.

Read full article »

Trucking Group Loses Bid To Block Dynamex Standard

A trucking group lost its bid to block California's newly adopted standard for distinguishing between independent contractors and employees after a federal judge ruled Friday that the standard isn't preempted by federal law and doesn't unconstitutionally single out the trucking industry.

Read full article »

Med School's Female Faculty Class Decertified In Wage Suit

An Illinois federal judge on Friday decertified a class of female faculty physicians who alleged they were underpaid for their work at Southern Illinois University School of Medicine, ruling a class action would be "impractical and unfair" given vast differences in the employees' job responsibilities.

Read full article »

Fox News Can't Arbitrate After Airing Dispute, Accusers Say

Two women accusing Fox News and former star Bill O'Reilly of defaming them asked the Second Circuit on Friday to undo a district court ruling kicking their claims to arbitration, saying Fox and O'Reilly lost their rights to arbitration by defaulting on their agreements.

Read full article »

DISCRIMINATION

Law360 Pro Say Podcast

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New Cases

Discrimination (47)
ERISA (27)
Labor (59)

LAW FIRMS

Aylstock Witkin
Baker Botts
BakerHostetler
Berg & Androphy
Blank Rome
Blasingame Burch
Bonnett Fairbourn
Bryan Cave
CKR Law LLP
Clark Love
Connell Foley
Cornerstone Law Group
Covington & Burling
Crowell & Moring
DLA Piper
Davis Polk
Day Pitney
Dentons
Einhorn Harris
Faegre Baker
Fox Rothschild
Franczek Radelet
Friedlander & Gorris
Gordon & Rees

AP, Ethnicity Editor Strike Deal On Race Bias Suit

The Associated Press and its race and ethnicity editor have reached a tentative deal ending her suit claiming the outlet allowed race- and sex-based harassment toward her and marginalized her when she complained, according to a filing in New York federal court.

Read full article »

Male Comic's Gender Bias Lawsuit Bombs In Federal Court

A Manhattan federal judge has spiked a comedian's discrimination suit accusing improv group Upright Citizens Brigade of unfairly shunning him after an allegedly shoddy investigation into rape allegations, finding free drinks and other compensation the comic said he received didn't qualify him as an employee.

Read full article »

Ill. District Must Face Title IX Suit Over Trans Bathroom Rule

A Chicago-area school district must face a lawsuit brought by a group of parents alleging the district's policy allowing transgender students to use bathrooms and locker rooms of their choice violates Title IX protections and the group's First Amendment rights, an Illinois federal judge ruled Friday.

Read full article »

WAGE & HOUR

29 Ex-Workers Ask To Testify Against Pizza Pro Mario Sbarro

Twenty-nine former steakhouse workers in a wage-and-hour suit against Mario Sbarro, of the global pizzeria chain, and his son have urged a New York federal court to toss the Sbarros' bid to stop them from testifying over working conditions at the now-shuttered eatery.

Read full article »

WHISTLEBLOWER

DOJ Seeks Toss Of Whistleblower's Gilead FCA Case

The U.S. Department of Justice has asked a California federal judge to nix a prominent False Claims Act case linking Gilead Sciences Inc. to sketchy drug manufacturing, following through on a vow the U.S. Department of Justice made toward the end of 2018.

Read full article »

WRONGFUL TERMINATION

Judge Entitled To Fire Staffer Over Online Posts, Texas Says

A former executive assistant to a Texas judge who posted online that she worked for "damn Republicans" wasn't fired exclusively over her partisan snipes, the state attorney general said, contending there was nothing wrong with the judge viewing the staffer's social media activity on the whole as an unacceptable disruption.

Read full article »

PEOPLE

Ogletree Snags Ex-Bryan Cave Atty For LA Employment Team

Ogletree has expanded its California team with the addition of a former Bryan Cave attorney whose nearly 30 years of employment experience includes litigation, counseling, investigations and training, among other things.

Read full article »

EXPERT ANALYSIS

3 Things To Expect After NCAA Student-Athlete Pay Decision

A California federal court recently found that the NCAA's limits on amounts

Greenbaum Rowe
Greenberg Traurig
HeplerBroom LLC
Hogan Lovells
Hoguet Newman
Holland & Hart
Holland & Knight
Jenner & Block
Jomarron Lopez
Jones Day
Kirkland & Ellis
Kline & Specter
Linklaters
Mayer Brown
Mazie Slater
McCarter & English
McCarthy & Holthus
Mintz Levin
Morgan Lewis
Morrison & Foerster
Motley Rice
Nelson Mullins
Norton Rose Fulbright
O'Melveny & Myers
Ogletree Deakins
Partridge Snow
Paul Hastings
Pechman Law Group
Pierce Atwood
Quinn Emanuel
Rasco Klock
Richards Layton
Shaw Keller
Sidley Austin
Skadden
Smith Mullin
Sullivan & Cromwell
Venable LLP
Williams & Connolly
WilmerHale
Withers

COMPANIES

Akorn Inc.
Alliance Defending Freedom
Amazon.com Inc.
American Bankers Association
American Bar Association
American Civil Liberties Union
American Federation of Government Employees
Anheuser-Busch Inbev SA/NV
Apple Inc.

members can pay student-athletes violate federal antitrust law. John Richard Carrigan of Ogletree discusses the opinion and its potential impact.

Read full article »

Defending Ill. Biometric Privacy Suits After Rosenbach

The Illinois Supreme Court's decision in Rosenbach v. Six Flags effectively foreclosed the argument that a plaintiff lacks statutory standing under the state's Biometric Information Privacy Act because they did not suffer any actual harm. But other defenses to BIPA claims remain, say Mathilda McGee-Tubb and Joshua Briones of Mintz.

Read full article »

Managing Gov't Supply Chain In An Age Of Protectionism

Aerospace, defense and government services companies must be prepared for significant supply-chain management challenges from the U.S., including recent efforts to encourage government contractors to use U.S.-manufactured materials, more aggressive enforcement of customs and duties laws, and increased enforcement under the False Claims Act, say attorneys at Hogan Lovells.

Read full article »

LEGAL INDUSTRY

Analysis

3 Mistakes Law Firms Make Dealing With Attorney Addiction

Law firms can go astray in numerous ways when faced with an attorney who is struggling with a substance abuse problem, and an inappropriate response could harm the individual and the organization. Here are three common pitfalls for firms in approaching attorney addiction.

Read full article »

Thomas Rejects Retirement, Says Faith Enhances His Oath

U.S. Supreme Court Justice Clarence Thomas squashed retirement rumors over the weekend at a Pepperdine School of Law dinner and said his religious faith makes him more diligent, and not biased, in his duties.

Read full article »

Analysis

Rosenstein Built A Policy Legacy, One Tweak At A Time

While history will remember Deputy U.S. Attorney General Rod Rosenstein for his pivotal role overseeing the Mueller investigation, he also left a quieter legacy of clarifying and streamlining policies and supporting U.S. Department of Justice prosecutors.

Read full article »

Mueller Report Headed To Congress By Mid-April, AG Says

U.S. Attorney General William Barr on Friday told members of Congress that he intends to send them a redacted version of special counsel Robert Mueller's report on his investigation into Russian interference in the 2016 election by mid-April, if not sooner.

Read full article »

Bush v. Gore Atty Calls Arrest Account 'Substantially Untrue'

Miami-based attorney Joseph Klock Jr., known for his role in the legal battle over the 2000 presidential election, is disputing the police account of events that led to him being charged with resisting arrest as police investigated a possible shooting on his property.

Read full article »

Pelvic Mesh MDL Fee Committee Accused Of Self-Dealing

A group of firms that worked on cases for plaintiffs in the multidistrict litigation over pelvic mesh implants has accused fee committee members of self-

Applebee's International Inc.
Associated Press
BTI Consulting Group Inc.
Baskin-Robbins Inc.
Boston Scientific Corp.
California Trucking Association
Coinbase Inc.
Comcast Corp.
CoreLogic Inc.
Dunkin' Brands Group Inc.
Dynamex, Inc.
Facebook
Fannie Mae
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Fresenius Kabi AG
Gilead Sciences Inc.
Google Inc.
Hazelden Betty Ford Foundation
Infosys Ltd.
Instagram Inc.
International Business Machines Corp.
Johnson & Johnson
Lloyds Banking Group PLC
Magnetar Capital LLC
Metro-Goldwyn-Mayer Studios Inc.
Microsoft Corp.
MillerCoors LLC
Monsanto Co.
Morgan Stanley
Mylan NV
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National Employment Law Project
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New Jersey State Bar Association
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Nike Inc.
Panera Bread Company
Point72 Asset Management LP
Publix Super Markets Inc.
Purdue Pharma LP
Red Hat Inc.
Sbarro Inc.
Shire PLC
Snap Inc.
Southwest Airlines Co.
Speedway LLC
Spokeo Inc.
Stryker Corp.
Take-Two Interactive Software, Inc.

dealing and obscuring the process of divvying up the case's proceeds.
Read full article »

Interview

Bouchard Steers Tight Chancery Court Ship Into The Future

Wary of rising and more complex caseloads and competing business litigation venues, Delaware's Chancery Court is quietly tightening courtroom schedules and giving closer scrutiny to fast-track requests, Chancellor Andre G. Bouchard told Law360 in an exclusive interview this week.
Read full article »

Linklaters Managing Partner Reappointed To Three-Year Term

International powerhouse Linklaters LLP announced Friday it has reappointed its firmwide managing partner to another three-year term, stressing the quality of legal work during his tenure.
Read full article »

WilmerHale Hires Back Former SEC Commish From Mylan

Mylan's Chief Legal Officer and former SEC Commissioner Daniel Gallagher is set to leave the pharmaceutical giant and rejoin WilmerHale as the law firm's securities department deputy chair, according to a Friday announcement.
Read full article »

The Top In-House Hires Of March

The high-profile legal department hires and promotions of March included appointments at Wells Fargo, Comcast, Ticketmaster, Dunkin' and the FDIC. Here, Law360 looks at these and some of the other top in-house announcements from the past few weeks.
Read full article »

GC Cheat Sheet: The Hottest Corporate News Of The Week

General counsel named 18 attorneys for their unwavering commitment to clients in a new report, the U.S. House passed a bill to toughen the Equal Pay Act, and Harvard law students escalated their pressure to end so-called coercive contracts in the legal industry. These are some of the stories in legal news you may have missed in the past week.
Read full article »

In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week.
Read full article »

Podcast

Law360's Pro Say: There's Corn Syrup In The Beer!

The beer wars moved from the barroom to the courtroom this week, as MillerCoors filed a false advertising lawsuit over Bud Light ads that say Miller Lite is made with corn syrup. Those ads might be technically true, but on this week's Pro Say our own Bill Donahue walks us through why that might not matter.
Read full article »

Ticketmaster Entertainment, Inc.
Treasury Wine Estates Ltd.
United States Cold Storage Inc.
Wal-Mart Stores Inc.
Wells Fargo & Co.
Zappos.com Inc.

GOVERNMENT AGENCIES

California Labor and Workforce Development Agency
California Supreme Court
Equal Employment Opportunity Commission
Federal Acquisition Regulatory Council
Federal Aviation Administration
Federal Deposit Insurance Corp.
Federal Reserve Bank of Boston
Federal Trade Commission
Food and Drug Administration
Illinois Supreme Court
Judicial Conference of the United States
Securities and Exchange Commission
Texas Attorney General's Office
U.S. Attorney's Office
U.S. Customs and Border Protection
U.S. Department of Justice
U.S. Department of Labor
U.S. House of Representatives
U.S. Supreme Court

Associate Attorney
O'Hagan Meyer
Newport Beach, California

Labor & Employment Associate
McGuireWoods LLP
-, -

Career Associate (Stamford Office)
McCarter & English, LLP
Stamford, Connecticut

Labor & Employment Associate
McCarter & English, LLP
-, -

Career Associate (Stamford Office)
McCarter & English, LLP
Stamford, Connecticut

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: High Court Could Address LGBT Bias, Family Leave
Date: Monday, April 1, 2019 7:10:51 AM

What you need to know to start your day.

High Court Could Address LGBT Bias, Family Leave

By Patricio Chile

The U.S. Supreme Court will release orders this morning. The justices could potentially grant or deny review in three cases that ask whether a federal anti-discrimination law protects LGBT workers. So far this term, the justices have considered those petitions at nine private conferences.

- **Family Leave:** The high court's order list could also include an Alaska Airlines case on whether federal labor law takes precedence over a Washington state law that allows workers to use earned **leave** to care for a sick family member.

- **Picketing Rights:** Additionally, a hospital asked the justices to review a finding that it violated federal law when it tried to bar off-duty nurses from holding **picket** signs on hospital property.

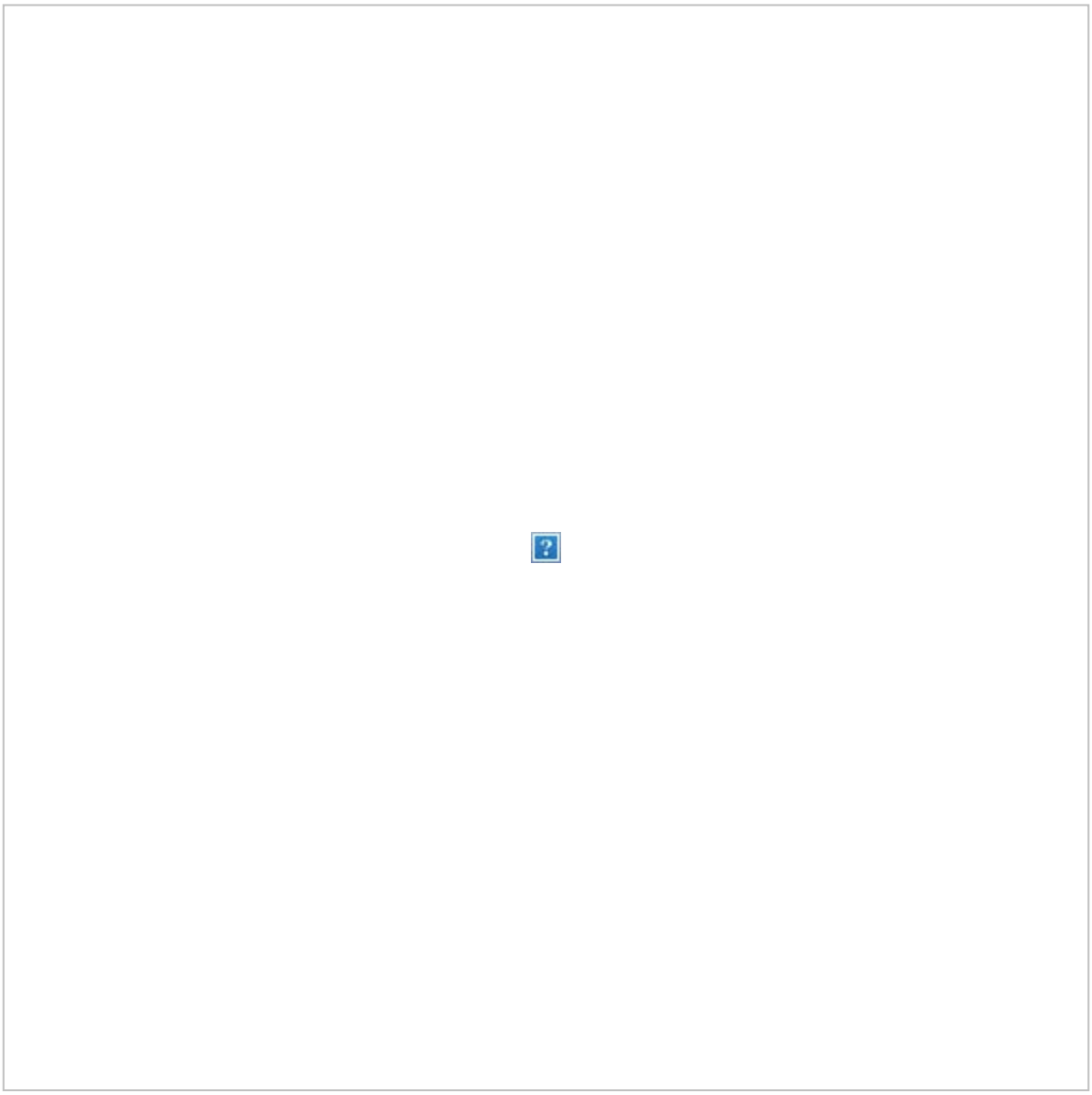
LABOR DEPARTMENT TO UNVEIL 'JOINT EMPLOYER' RULE

The Labor Department today will roll out a proposal to limit the circumstances in which franchisers and businesses that use workers supplied by staffing agencies are liable for wage and hour violations.

- **Four Factors:** The DOL will propose a four-factor test for determining whether companies are joint employers of workers owed unpaid minimum

wages or overtime. The department wants to weigh the ability to hire and fire, supervise and control schedules, set pay rates, and maintain employment records, Chris Opfer reports.

- **Impact Unclear:** Some former DOL officials say the department's regulation is "interpretive" and doesn't have the same legally binding effect as other rules.



McDonald's is locked in a legal dispute over whether it's a "joint employer" of franchise restaurant workers.
Photo by Justin Sullivan/Getty Images

WHAT ELSE WE'RE WATCHING

- **Acosta on Hill:** Labor Secretary Alexander Acosta on Wednesday is headed to Capitol Hill to testify before a House Appropriations

subcommittee. The hearing will mark the first time Acosta has met publicly with lawmakers since some Democrats called for him to resign over his role in the controversial plea deal for accused teen sex trafficker **Jeffrey Epstein**. Punch in with Chris Opfer and Jaclyn Diaz.

- **Skilled-Worker Visas:** Today is the first day of H-1B filing season, when employers can apply for skilled guestworker **visas** for workers starting Oct. 1 or later. This is the first year the H-1B lottery will be changed up to boost the number of workers with advanced degrees who get the visas.

- **Pay Hikes:** Unions are continuing to negotiate larger first-year pay increases compared with the same point in 2018, but overall **wage hikes** edged slightly lower for the year, Andrew Wallender reports.

- **Manufacturing Report:** The Institute for Supply Management will release its March **manufacturing** report at 10 a.m.

DAILY RUNDOWN

Top Stories

Walmart Driver Sacked Over Drug Test Didn't Show 'Shy Bladder'
Walmart won a suit alleging it didn't accommodate a truck driver who said his inability to comply with a random drug test should have been excused by his medical condition, a federal judge ruled.

Workers Compromised by Data Breach Advance Negligence Suit
Two plaintiffs whose personal identifying information was pilfered through a successful phishing incident at work have survived their employer's attempt to get their negligence and invasion of privacy suit thrown out of court.

New York's Metro-North Railroad Didn't Retaliate Against Worker
Metro-North Railroad Co. didn't violate the Federal Rail Safety Act when it disciplined a machinist for refusing to climb a ladder to fix a train's wiper blade, a federal court said.

EEOC May Owe Union Legal Fees for Getting Mediator's Job Back
A union that represents government employees may recoup its attorneys' fees for helping an ousted Equal Employment Opportunity Commission mediator get

his job back, the Federal Circuit ruled.

Discrimination

Ford Motor Scores $14.7M Cut to Arab Worker's Bias Award
A federal court in Michigan overturned a jury's $15 million punitive damages award to a former Ford Motor Co. manager of Arabic descent who sued for national origin or race bias and job retaliation.

Upright Citizens Brigade Slips Accused Rapist Comic's Bias Suit
A stand-up comedian who says the Upright Citizens Brigade banned him from performing after he was falsely accused of rape can't pursue his sex discrimination claims, a federal judge ruled.

State & Local Laws

Kentucky Pregnant Worker Accommodation Bill Sent to Governor
Pregnant women and nursing mothers in Kentucky would receive new workplace accommodations under a bill sent to Gov. Matt Bevin (R).

Labor Relations

Striking Chicago Musicians Just Can't Stop the Music
Musicians of the Chicago Symphony Orchestra have already given four free concerts to standing-room-only crowds, hoping to charm lovers of classical music and raise awareness of their three-week-old labor dispute.

Immigration

30,000 More Seasonal Worker Visas to Become Available
An additional 30,000 seasonal guestworker visas will be available to U.S. employers this year.

Arpaio, Deputies Must Defend Actions Against Restaurant at Trial
The owner and manager of two Phoenix-area restaurants are going to trial against former Maricopa County, Ariz., Sheriff Joe Arpaio and his deputies in a civil lawsuit accusing them of mishandling an immigration-related raid conducted in 2013.

WORKFLOWS

Kirkland & Ellis has acquired at least 20 attorneys from Proskauer to launch a new transactional team in Los Angeles | **Squire Patton Boggs** added six new lawyers to its international dispute resolution team in New York from Curtis, Mallet-Prevost, Colt & Mosle | **Akin Gump** announced that private equity funds lawyers Daniel Quinn and Aleksander Bakic will join the firm in London as partners from O'Melveny & Myers

For all of today's Bloomberg Law headlines, visit Daily Labor Report

From: Access to Justice Law360
To: Ring, John
Subject: Are Law Schools Helping Students Who Want To Help Others?
Date: Monday, April 1, 2019 7:40:10 AM

Access to Justice

Campus2.jpg

Are Law Schools Helping Students Who Want To Help Others?

Far fewer new attorneys go into public interest law each year than start at private firms, leading institutions and students to ask if law schools are perpetuating that imbalance and, more importantly, what they can do about it.
Read full article

Violence Against Women Reforms Face Uncertain Road Ahead

Efforts to reform the federal law that provides funding for programs targeting violence against women have sparked debate on sensitive social issues, including protections for LGBTQ Americans and gun rights. With a vote on House legislation looming this week, it's unclear where Congress will find common ground.
Read full article

NJ Hardens Link Between Legal Weed And Clean Slates

Tens of thousands of New Jersians could benefit from expungement provisions

Monday, April 1, 2019

LAW FIRMS
Aylstock Witkin
Baker Botts
BakerHostetler
Berg & Androphy
Blank Rome
Blasingame Burch
Clark Love
Cornerstone Law Group
Covington & Burling
Crowell & Moring
DLA Piper
Davis Polk
Day Pitney
Dentons
Faegre Baker
Friedlander & Gorris
Greenberg Traurig
Hogan Lovells
Holland & Hart
Holland & Knight
Jenner & Block
Jomarron Lopez
Jones Day
Kirkland & Ellis
Kline & Specter
Linklaters
Mayer Brown
Mazie Slater
McCarter & English
McCarthy & Holthus
Morgan Lewis
Morrison & Foerster
Motley Rice
Nelson Mullins
Norton Rose Fulbright
O'Melveny & Myers
Partridge Snow

included in the state's bill to legalize and regulate adult-use cannabis in what's become the latest example of how the national discussion around legalization has offered important inroads for advocates of clean slate reforms.
Read full article

Research Boosts Push For Automatic Expungements

Like most other states that allow people to clear their criminal records, Michigan imposes strict eligibility restrictions and requires former offenders to navigate a complex legal process. But newly published research out of the Wolverine state provides fuel for an ongoing national movement to make the process more accessible by automating expungements.
Read full article

Calif. Justices Back Right To Counsel In Prosecutor's Appeal

An indigent woman accused of driving under the influence won her case at the trial level after a California public defender got key evidence thrown out. When prosecutors appealed the evidence issue, an important question emerged: Did Rosa Lopez have the right to court-appointed counsel on a pre-trial appeal?
Read full article

Pro Bono Spotlight

How A DLA Piper Help Desk Is Aiding Tenants Facing Eviction

A help desk started by DLA Piper in Chicago eviction court guides tenants through what can be an unfamiliar and confusing legal process, working to make sure people walk away with better outcomes and no black marks on their record.
Read full article

Perspectives

How Do We Know If Prosecutors Are Doing A Good Job?

From Special Counsel Robert Mueller to Chicago prosecutor Kim Foxx, prosecutors are receiving plenty of negative attention in the news, but there is no clear standard for judging prosecutor performance, says Jeffrey Bellin, a professor at William & Mary Law School.
Read full article

Perspectives

The Criminal Justice System's Algorithms Need Transparency

Trade secret protections for pretrial risk assessment algorithms must be eliminated, or else criminal defendants will be unable to challenge or even examine the data being used to keep them incarcerated, says Idaho state Rep. Greg Chaney, whose bill forcing algorithmic transparency recently passed the Idaho Legislature.
Read full article

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Quinn Emanuel
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Richards Layton
Shaw Keller
Sidley Austin
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American Bankers Association
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Anheuser-Busch Inbev SA/NV
Applebee's International Inc.
BTI Consulting Group Inc.
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Boston Scientific Corp.
Center for American Progress
Coinbase Inc.
Comcast Corp.
CoreLogic Inc.
Drug Policy Alliance
Dunkin' Brands Group Inc.
Facebook
Fannie Mae
Federalist Society
Fifth Third Bancorp
Fresenius Kabi AG
Google Inc.
Hazelden Betty Ford Foundation
Instagram Inc.
International Business Machines Corp.
Johnson & Johnson
Lloyds Banking Group PLC
Magnetar Capital LLC
Metro-Goldwyn-Mayer

Studios Inc.
Microsoft Corp.
MillerCoors LLC
Monsanto Co.
Morgan Stanley
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National District Attorneys Association
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New Century Financial
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Nike Inc.
Northeastern University
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Publix Super Markets Inc.
Purdue Pharma LP
Red Hat Inc.
Shire PLC
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GOVERNMENT AGENCIES

California Supreme Court
Chickasaw Nation
Federal Deposit Insurance Corp.
Federal Reserve Bank of Boston
Federal Trade Commission
Idaho Legislature
Securities and Exchange Commission
U.S. Department of Justice
U.S. Department of Labor
U.S. House of Representatives
U.S. Supreme Court

From: Martin, Andrew
Subject: Legal News FYI 04-01-19
Date: Monday, April 1, 2019 8:08:15 AM
Attachments: image001.png

Monday, April 1, 2019

Labor Department to Limit Companies' 'Joint Employer' Liability

BloombergLaw - Employment Law News 01 Apr 2019 06:36

• Proposal covers franchise, other contract arrangements • Limits liability for minimum wage, overtime By Chris Opfer The Labor Department today will roll out a proposal to shield franchisers and businesses that hire workers through staffing firms from...

Tenet-owned Michigan hospital settles alleged labor violations

Becker's Hospital Review 29 Mar 2019 17:57

Commerce Township, Mich.-based Huron Valley-Sinai Hospital and its nurses have settled allegations that the hospital violated U.S. labor law. The settlement, cited in a Michigan Nurses Association news release , requires Huron Valley not to "interfere...

How "illegal" teacher strikes rescued the American labor movement

Vice News 29 Mar 2019 11:04

Organized labor in the U.S. is having a moment. Sen. Bernie Sanders recognized a staff union for his campaign, the first presidential candidate ever to do so. Kamala Harris, the California senator running for president, unveiled her first big 2020 policy...

How "illegal" teacher strikes rescued the American labor movementREAD MORE

Vice News 29 Mar 2019 10:28

Organized labor in the U.S. is having a moment. Sen. Bernie Sanders recognized a staff union for his campaign, the first presidential candidate ever to do so. Kamala Harris, the California senator running for president, unveiled her first big 2020 policy...

Elon University Adjuncts Unionize

Cherry Bekaert News 29 Mar 2019 07:44

In an effort to improve working conditions, adjunct professors at Elon University voted his week to form a union. The second of its kind among faculty members in North Carolina, the union aims to negotiate pay raises, benefits, and other work-related...

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: NLRB loses field staff — Closing the border? — Democrats cry foul as Trump slashes aid to Central America
Date: Monday, April 1, 2019 10:04:25 AM

View online version

2018 Newsletter Logo: Morning Shift

04/01/2019 10:00 AM EDT

By IAN KULLGREN (ikullgren@politico.com; @iankullgren)

With help from Ted Hesson and Rebecca Rainey.

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

— The NLRB union says the agency's field staff has shrunk 17 percent since the start of the Trump administration.

— Senior White House officials re-upped President Donald Trump's threat to close the border.

— Democrats are in an uproar over Trump's plans to slash hundreds of millions of dollars in aid to Honduras, El Salvador, and Guatemala.

APRIL FOOLS! It's Monday, April 1, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

NLRB BLEEDS FIELD STAFF: The NLRB has lost 17 percent of its field staff since the start of the Trump administration, according to an analysis that the agency's union provided Morning Shift. In a letter to Sens. Roy Blunt (R-Mo.) and Patty Murray (D-Wash.), the National Labor Relations Board Union said that the number of field staff fell from 990 in February 2017 to 820 as of March 1.

According to the union, the reductions began in early 2017 after acting White House Chief of Staff Mick Mulvaney, then director of the Office of Management and Budget, told agencies to cut staff. NLRB general counsel Peter Robb, meanwhile, sought to tighten political appointees' control over the agency by consolidating field offices. Most of the staff reductions have occurred through attrition; last year, the NLRB offered buyouts.

The NLRBU says agency leadership is understating the number of unfair labor practice filings streaming into field offices. In its budget request , the agency told Congress that such filings were down 7-10 percent; actually, the union says, they're up 2 percent. "Given that publicly available data on the agency website shows an increase in unfair labor practice case filings so far this year over last year," NLRBU President Burt Pearlstone said in a statement to Morning Shift, "one would be hard-pressed to conceive of any legitimate analysis that would yield such a precipitous drop." Union leaders will press their case this week in meetings with

Blunt and Murray's staffs, as well as the staffs of Appropriations subcommittee chair Rosa DeLauro (D-Conn.) and House Education and Labor Chairman Bobby Scott (D-Va.).

AT THE BORDER

CLOSING THE BORDER?: White House officials on Sunday re-upped President Donald Trump's threats to close the border. Speaking on Sunday talk shows, Acting Chief of Staff Mick Mulvaney said it would take "something dramatic" to make Trump change his mind, and White House Counselor Kellyanne Conway insisted the threat "certainly isn't a bluff." Trump tweeted Friday that he will close the border if Mexico doesn't "immediately stop ALL illegal immigration coming into the United States."

The White House's statements contradicted DHS Kirstjen Nielsen, who said Friday that she had no active plans to shut down the border. "It's short, at the moment, of the full closure of any port," Nielsen said, adding that homeland security will "continue to operationally assess" the situation. "But I think what the president is making clear is with these numbers if we have to close ports to take care of all of the numbers who are coming, we will do that." It's worth remembering that Trump's threats to close the border are nothing new. According to Mother Jones, Trump has tweeted the threat no fewer than seven times since October.

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— "This lawmaker says a colleague 'mansplained' gender pay equity law to her on the House floor," from the Washington Post

THAT'S ALL FOR MORNING SHIFT!

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From:	Ring, John
To:	Lucy, Christine B.
Subject:	FW: POLITICO"s Morning Shift: NLRB loses field staff — Closing the border? — Democrats cry foul as Trump slashes aid to Central America
Date:	Monday, April 1, 2019 10:21:00 AM

From: Morning Shift <morningshift@politico.com>
Sent: Monday, April 1, 2019 10:04 AM
To: Ring, John <John.Ring@nlrb.gov>
Subject: POLITICO's Morning Shift: NLRB loses field staff — Closing the border? — Democrats cry foul as Trump slashes aid to Central America

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2018 Newsletter Logo: Morning Shift

04/01/2019 10:00 AM EDT

By IAN KULLGREN (ikullgren@politico.com; @iankullgren)

With help from Ted Hesson and Rebecca Rainey.

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

— The NLRB union says the agency's field staff has shrunk 17 percent since the start of the Trump administration.

— Senior White House officials re-upped President Donald Trump's threat to close the border.

— Democrats are in an uproar over Trump's plans to slash hundreds of millions of dollars in aid to Honduras, El Salvador, and Guatemala.

APRIL FOOLS! It's Monday, April 1, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

NLRB BLEEDS FIELD STAFF: The NLRB has lost 17 percent of its field staff since the start of the Trump administration, according to an analysis that the agency's union provided Morning Shift. In a letter to Sens. Roy Blunt (R-Mo.) and Patty Murray (D-Wash.), the National Labor Relations Board Union said that the number of field staff fell from 990 in February 2017 to 820 as of March 1.

According to the union, the reductions began in early 2017 after acting White House Chief of Staff Mick Mulvaney, then director of the Office of Management and Budget, told agencies to cut staff. NLRB general counsel Peter Robb, meanwhile, sought to tighten political appointees' control over the agency by consolidating field offices. Most of the staff reductions have occurred through attrition; last year, the NLRB offered buyouts.

The NLRBU says agency leadership is understating the number of unfair

labor practice filings streaming into field offices. In its budget request , the agency told Congress that such filings were down 7-10 percent; actually, the union says, they're up 2 percent. "Given that publicly available data on the agency website shows an increase in unfair labor practice case filings so far this year over last year," NLRBU President Burt Pearlstone said in a statement to Morning Shift, "one would be hard-pressed to conceive of any legitimate analysis that would yield such a precipitous drop." Union leaders will press their case this week in meetings with Blunt and Murray's staffs, as well as the staffs of Appropriations subcommittee chair Rosa DeLauro (D-Conn.) and House Education and Labor Chairman Bobby Scott (D-Va.).

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From: ABA Section of Labor and Employment Law
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Upcoming Webinar:

FLSA Exemptions after Encino Motorcars

On Wednesday, April 10 at 12:00pm EDT via webinar,
join a panel of experts to discuss the impact of *Encino Motorcars*. This panel will discuss the application and interpretation of the FLSA going forward for employee classification and litigation, including an examination of how the "fair reading" doctrine is playing out in the lower courts.

PANEL:

- Union Side: Greg McGillivary, Woodley & McGillivary
- Employee Side: Matthew Helland, Nichols Kaster, PLLP
- Employer Side: Ellen Kearns, Constangy, Brooks, Smith & Prophete, LLP
- Moderator: Keith Greenberg, Arbitrator and Mediator

In *Encino Motorcars, LLC v. Navarro*, the United States Supreme Court held that service advisors at car dealerships are exempt from the overtime provisions of the Fair Labor Standards Act. In addition to that limited holding, the Court also wrote that FLSA exemptions should be given a "fair reading." That statement ran contrary to decades of the Court's own precedent favoring the principle that exemptions to the FLSA should be construed narrowly – that is, against employers.

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From:	Cole,Tracie L.
To:	Cole,Tracie L.
Subject:	36th Annual Carl A. Warns, Jr. & Edwin R. Render Labor and Employment Law Institute - SPEAKER INFORMATION
Date:	Monday, April 1, 2019 12:06:57 PM
Attachments:	image001.png image002.png image003.png image004.png Warns Program Draft 3.20.19.docx Speaker Info Letter 2019 docx.doc

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Dear 2019 Warns – Render Labor and Employment Law Speakers:

Thank you for agreeing to speak at the upcoming University of Louisville Brandeis School of Law's *36th Annual Carl A. Warns, Jr. & Edwin R. Render Labor and Employment Law Institute.* We anticipate another successful year, thanks to all of you!

I have attached a preliminary schedule and information pertinent to you as a speaker. Please let me know if you have any questions, and I hope to hear from you soon.

Thank you,

Tracie

Tracie L. Cole – Director, Law Resource Center & Events Coordinator, University of Louisville Brandeis School of Law
tracie.cole@louisville.edu / +1-502-852-1230 [Tel] / +1-502-852-7299 [Fax]

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BRANDEIS SCHOOL OF LAW

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Monday, April 1, 2019 4:35:09 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

DOL to Narrow Franchiser, Staffing Wage Liability (1)

By Jaclyn Diaz and Chris Opfer

The Labor Department proposed a new regulation April 1 to limit shared wage and hour liability for companies in franchise and staffing arrangements.

Agency Waited Too Long to Contest Worker's Bias Theory (1)

By Patrick Dorrian and Paige Smith

A Delaware community action agency must pay a former employee $22,501 for disability discrimination even though she prevailed on an outdated legal theory, the Third Circuit ruled April 4.

County Employee Demoted for Testifying Loses Free Speech Case

By Bernie Pazanowski

The First Amendment rights of a county employee weren't violated when he was demoted for testifying as a character witness on behalf of his sister-in-law in a child custody dispute with another county employee, the Tenth Circuit ruled March 29.

AT&T Worker Gets Trial by Pointing to Second FMLA Leave Policy

By Patrick Dorrian

A jury must decide whether a sales consultant at an AT&T store in Kentucky gave the company timely notice of her use of job-protected medical leave, a federal judge ruled.

DISCRIMINATION

Pryor Cashman Must Face Trial on Older Lawyer's Bias Claims

By Patrick Dorrian

A trusts and estates attorney may be able to show Pryor Cashman LLP fired him at age 61 because it wanted younger associates it could groom to be partners, a federal judge ruled.

Apple, Airbnb, Other Employers Take California Pay Equity Pledge

By Laura Mahoney

Apple Inc. and Salesforce.com are among 13 companies pledging to review pay, hiring, and promotion practices to identify potential bias and close the wage gap in California.

WAGE & HOUR

JFK Workers' $2.5M Wage Settlement Hits Road Block

By Porter Wells

A federal judge in New York declined to sign off on a proposed settlement between Allied Universal Security Services and a set of security guards and supervisors at John F. Kennedy International Airport, saying the parties hadn't filed necessary information with the court.

Panera Settles Class Action Wage Lawsuit for $2 Million

By Brian Flood

Panera Bread Co.'s $1.99 million settlement of a class action employment case was approved by a federal court March 29.

HARASSMENT & RETALIATION

United Technologies Must Face Jet Engine Retaliation Lawsuit

By Daniel Seiden

United Technologies Corp. and its subsidiary Pratt and Whitney must face claims they violated the False Claims Act's anti-retaliation provision, a federal court said.

STATE & LOCAL LAWS

New York Sets Post-Janus Protections for Public Employee Unions

By John Herzfeld

The New York State Legislature passed a set of legal protections for public employee unions against the effects of a 2018 U.S. Supreme Court decision curbing their ability to collect compulsory agency fees from non-members.

$12 Minimum Wage Law Signed in New Mexico

By Brenna Goth

New Mexico will boost its state minimum wage to $12 an hour by 2023 and increase pay for tipped workers.

West Virginia 'Right-to-Work' Law Gets New Legal Life—for Now

By Andrew M. Ballard

A state court ruling that struck down West Virginia's "right-to-work" law was put on hold.

Michigan City's Constitutional Pension Challenge Falls Flat

By Jacklyn Wille

A Michigan city that argued the state's constitution prevented it from contracting with a multiemployer pension fund lost its lawsuit attempting to avoid more than $4.5 million in pension liability.

LABOR RELATIONS

Off-Duty Picketing at Hospital Won't Get High Court Look (1)

By Hassan A. Kanu and Jay-Anne B. Casuga

The U.S. Supreme Court won’t take up an appeal on whether federal labor law protects off-duty hospital workers who held stationary picket signs on medical center property.

Finalized NAFTA 2.0 Deal Unlikely by Late Summer, AFL-CIO Says

By Andrew Wallender

A proposed trilateral trade agreement between the U.S., Mexico, and Canada is set to fail in Congress if the Trump administration pushes a vote in the next few months, the president of the AFL-CIO said April 1.

Union Workers' Pension Fund Transfer Suit Gets Class Treatment

By Jacklyn Wille

A lawsuit by asphalt plant workers who said they lost out on a portion of their pension and health benefits when they switched unions will receive class action treatment.

SUPREME COURT

Justices Back Relaxed Evidence Rule for Social Security Benefits

By Kimberly Strawbridge Robinson

The U.S. Supreme Court refused to adopt a categorical rule that would have allowed courts to second-guess Social Security vocational experts.

Supreme Court Won't Review Alaska Airlines Family Leave Case (1)

By Genevieve Douglas

Alaska Airlines won't be able to argue before the U.S. Supreme Court that federal labor law takes precedence over a Washington state law that allows workers to use earned leave to care for a sick family member.

IMMIGRATION

Canadian Physician Can Practice in U.S. Without Obtaining Visa

By Laura D. Francis

Customs and Border Protection unlawfully blocked a Canadian doctor from quickly assuming a post in an underserved area following the completion of his medical residency, a federal judge in New York ruled.

HEALTH CARE & BENEFITS

Boeing Hit With 401(k) Suit Over 737 Max Crashes, Stock Drop

By Jacklyn Wille

Boeing Co.'s troubles following last month's Ethiopian Airlines crash increased when two former employees sued the company for allegedly failing to protect their retirement savings from a $65 drop in Boeing stock following the crash.

Bankers Trust Must Face Lawsuit Over $75.5M Stock Plan Deal

By Jacklyn Wille

Bankers Trust Co. of South Dakota may be liable for its role in a $75.5 million transaction in which family-owned Sta-Home Health & Hospice became employee-owned through a newly created employee stock ownership plan.

George Washington University Retirement Plan Suit Hits Speedbump

By Jacklyn Wille

A proposed class action targeting George Washington University's retirement

plan may be in jeopardy after a federal judge raised questions about the named plaintiff's standing to sue.

ALSO IN THE NEWS

U.S. Factory Gauge Rises From Two-Year Low on Employment Gains

By Jeff Kearns

A gauge of U.S. factories topped estimates in March, rising from a two-year low on strength in employment and orders and signaling stabilization after a rocky few months.

Anti-Semitic Facebook Post May Count as Protected Free Speech

By Patrick Dorrian

New York's Westchester Medical Center failed in its bid to knock out of court a former compliance director's claim the hospital fired her illegally over an off-duty Facebook post seen as anti-Semitic.

Trump's Dealmaking Prowess Tested in Fight Between Oil, Farmers

By Mario Parker

If Donald Trump’s administration was looking for signs of easing tensions between two of his vaunted constituencies -- blue-collar oil and rural farmers -- a hearing in Michigan proves otherwise.

Punching In: Acosta, Democrats Have a Few Things to Discuss

By Chris Opfer and Jaclyn Diaz

Monday morning musings for workplace watchers

LATEST CASES

Case: Individual Employment Rights/First Amendment (10th Cir.)

A San Miguel County, Colorado supervisor in the road and bridge department

unsuccessfully alleged that his employer violated his First Amendment right of free speech when the county demoted him for testifying truthfully in state court as a character witness for his sister-in-law in a child custody dispute. A federal court of appeals rejects his assertion that any sworn testimony given by a government employee in court as a citizen is per se always a matter of public concern. Although his testimony addressed a matter of significant concern to the private parties in the proceeding, it didn't relate to any matter of political, social or other concern to the public, the court said. The case is Butler v. Bd. of Cty. Comm'rs for San Miguel Cty., 2019 BL 111214, 10th Cir., No. 18-1012, 3/29/19.

Case: Wage & Hour/Independent Contractors (E.D. Ark.)

The "key guy" for an Arkansas construction company, whose duties included unlocking doors for workers and ensuring subcontractors were accounted for, established that he was an employee of the company, rather than independent contractor excluded from federal and state wage law, because his tasks didn't require special skills, the only "tools" he provided for himself were paper and pens, the company told him when to report to work each morning, and he didn't perform work for any other company as a "key guy." The case is Marshall v. MWF Constr., LLC, 2019 BL 111993, E.D. Ark., No. 4:18-CV-00254 BSM, 3/29/19.

Case: Wage & Hour/Tips (N.D. Ohio)

An Ohio banquet hall wasn't required to pay its servers the full minimum wage rate, rather than the tipped minimum wage rate, for preparatory and cleaning work they performed before and after events, because, unlike restaurant employees, the tip they received was based on the service they provided for the entire event. The case is Matusky v. Avalon Holdings Corp., 2019 BL 112682, N.D. Ohio, No. 4:17CV1535, 3/29/19.

Case: Discrimination/Harassment (5th Cir.)

A female mathematics professor at the Southern University of New Orleans loses her gender-based harassment claim against her supervisor, because even though he humiliated and undermined her so severely that a student said that his behavior "bordered on the barbaric," she couldn't show he had

harassed her because of her sex. Neither a co-worker's comment that her boss acted that way because she talked too much "for a woman," nor her boss's own comments that she should be more submissive and respectful were enough to show he acted based on gender bias, the court said. The case is Heath v. Elaasar, 2019 BL 114018, 5th Cir., 17- 30643, unpublished 4/1/19.

Case: Wage & Hour/Motor Carriers (D. Nev.)

A Nevada transportation company established that its shuttle drivers are exempt from the Fair Labor and Standards Act as motor carriers, because undisputed evidence shows that the U.S. Department of Transportation certified the company's fleet as commercial motor vehicles, that the drivers' primary duties included picking up and dropping off airport passengers, and that they engaged in interstate commerce by regularly transporting passengers across state lines. The case is Wright v. Jacob Transp., LLC, 2019 BL 113549, D. Nev., 2:15-cv-00056-JAD-NJK (Lead), 3/31/19.

Case: Discrimination/Discharge (E.D. Mich.)

General Motors didn't discriminate against a female employee in Michigan when it fired her for repeated mistakes, even though she says her boss blamed her for her male co-worker's mistakes. She couldn't show she was treated differently because male co-workers accused of similar conduct were also fired, she could only identify two mistakes— which occurred a year apart—that she said were unfairly attributed to her, and the male co-workers involved in those incidents who were not fired did not have the same disciplinary history as she, the court said. The case is Hunter v. Gen. Motors LLC, 2019 BL 113434, E.D. Mich., 17-10314, 3/31/19.

Case: FMLA/Notification (E.D. Ky.)

An AT&T retail store employee can go ahead with interference and retaliation claims under the Family Leave and Medical Act after she was fired as she was about to take protected leave for anxiety and migraine headaches, because factual issues exist as to, among other things, whether company policy actually did require her to request leave through a centralized department or through her supervisor as she did. The employee may also refute the decision-makers alleged honest belief that she had accrued unexcused absences past the

attendance-policy threshold, given evidence that earlier excused absences may have been reclassified as unexcused after learning that the employee's request for increased FMLA leave had been approved. Archey v. AT&T Mobility Servs. LLC, 2019 BL 111317, E.D. Ky., No. 17-91-DLB-CJS, 3/29/19.

Case: Wage & Hour/Retaliation (N.D. Tex.)

The former chief human resources officer for a Texas auto financing company didn't establish that he wasn't just performing his job when he reported to his superiors that the company had misclassified several employees as overtime-exempt for purposes of his claim that he was fired in retaliation for making that report, because he acknowledge that ensuring company compliance with federal and state wage requirements was one of his job duties, and he didn't present any evidence to support his contention that he eventually went above his superiors and reported the alleged misclassification to the board of directors. The case is Binh Hoa Le v. Exeter Fin. Corp., 2019 BL 113758, N.D. Tex., 3:15-CV-3839-L, 3/31/19.

Case: Discrimination/Adverse Action (E.D.N.Y.)

A former bartender at a restaurant in Brooklyn, N.Y., can't show that he was fired for filing sexual harassment complaints, because he was never actually fired. The record indicates instead that he abandoned his job, because he stopped answering his boss's texts about scheduling shifts, told his boss that he was going on vacation with his family and would be in touch when he returned, but never got in touch again about future shifts, the court said. The case is Pape v. Dircksen & Talleyrand Inc., 2019 BL 113445, E.D.N.Y., 16-CV-05377 (MKB) (SJB), 3/31/19.

Case: Discrimination/Discharge (W.D. Va.)

A black, protected-age former kitchen manager at Applebee's loses his race and age discrimination claims based on his discharge, because he couldn't show that his poor performance wasn't the true reason he was fired. He had several written and verbal reprimands about his failure to follow proper food safety protocol—and was warned that these could lead to termination—and the co-workers he pointed out as having received more favorable treatment had different job titles and had not committed as many violations as he had, the

court said. The case is Brooks v. Potomac Family Dining Grp. Operating Co., 2019 BL 113689, W.D. Va., 5:17-cv-00049, 3/31/19.

Case: Labor Relations/Arbitration (D. Nev.)

An arbitrator didn't err in finding that Treasure Island LLC lacked just cause to fire an employee based on a positive drug test. Treasure Island argued that the arbitrator refused to apply an absolute presumption in a labor contract, that a positive drug test means an employee is under the influence of a controlled substance, but the arbitrator found that Treasure Island didn't act with reasonable cause in ordering the test, and that the test administered wasn't "the proper gc/ms blood test" that the contract requires. The case is Treasure Island, LLC v. Local Joint Exec. Bd. of Las Vegas, 2019 BL 113602, D. Nev., 2:18-cv-00898-JAD-GWF, 3/31/19.

Case: Discrimination/Race and National Origin Discrimination (D.D.C.)

A Hispanic former cashier at a cafe in the District of Columbia may go to trial on her claim that she, like other Hispanic employees, was denied the right to have breakfast or take breaks, and was forced to only speak English, because of her race or national origin. The cafe also employed Korean workers who could schedule breaks whenever they liked, which wasn't totally explained by the fact that they were salaried while Hispanic employees were hourly, especially given evidence that their supervisor only yelled at Hispanic employees, and the record isn't clear as to whether the English-only requirement was materially adverse. The case is Portillo v. ILCreations Inc., 2019 BL 113314, D.D.C., 17-1083 (RDM), 3/31/19.

Case: Individual Employment Rights/Whistleblowing (S.D.N.Y.)

Metro-North Railroad Co. didn't retaliate against a machinist in violation of the Federal Rail Safety Act when it fired him for "insubordination" after he reported a defective wiper blade on one of the trains, and then refused a supervisor's order to change the blade because he believed it was unsafe to use a ladder. The machinist failed to show he engaged in protected activity, and even if he did, he was disciplined for insubordination, not for reporting or refusing to engage in an unsafe task, a court said. The machinist may have subjectively

believed the wiper blade was a safety risk, but he didn't show his belief was objectively reasonable, because he never identified the problem with the wipers. The case is March v. Metro-North R.R., 2019 BL 110467, S.D.N.Y., 16-CV-8500 (NSR), 3/28/19.

Case: Discrimination/Discharge (S.D.N.Y.)

A fired Jewish New York City probationary sanitation worker wasn't entitled to a trial on his claim that his religion, rather than numerous falsifications on his employment application that were discovered during a background investigation, was the reason he was discharged, even if an investigator asked him if he was "Jewish" and replied to his affirmative response by saying "that's what I needed to know." The investigator's alleged statements aren't facially derogatory or discriminatory, she neither wrote the final report recommending his termination nor made the discharge decision, and the employee omitted from his application the facts that he had eight prior criminal convictions, that he had worked for the New York City Transit Authority for ten years, and that he had been fired from the NYCTA for stealing its property, insubordination, and being absent without proper authority. The case is .

Case: Discrimination/Promotion (E.D. Ky.)

A protected-age U. S. Department of Agriculture employee may proceed to trial on his claim that he wasn't selected for a promotion because of his age. The employee previously had been selected for the promotion, a new supervisor canceled the promotion vacancy due to a reorganization plan that never took place, there was evidence that the plan wasn't sincere and that it would not have impacted the position, the vacancy was reposted three months later, the employee alleges that the supervisor misled him about the selection process, there were post-cancellation notes indicating that the protected-age employee wasn't going to be selected if he reapplied, and the selected candidate was significantly younger and once had been tied as the lowest rated qualifying applicant when the position was posted a few years earlier, the court found. The case is .

From: Meacham, Christopher
To: Ring, John
Subject: ABA National Conference on Equal Employment Opportunity Law
Date: Monday, April 1, 2019 5:12:31 PM
Attachments: Roster.pdf
Agenda FINAL.PDF

Dear Equal Employment Opportunity Law Conference Registrants:

Please find attached the Agenda and Roster for the 2019 ABA National Conference on Equal Employment Opportunity Law.

Papers and other meeting materials are available online at www.ambar.org/EEOpapers . (NOTE: Paper copies will not be provided at the meeting.)

We look forward to seeing you in Coral Gables!

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Presented by the Equal Employment Opportunity Committee
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National Conference on
Equal Employment Opportunity Law
April 3 – 6, 2019
Coral Gables, Florida

Schedule of Events

Wednesday, April 3

2:00 – 7:30 pm
Registration
Country Club Ballroom

3:00 – 3:30 pm
Welcome from Committee Co-Chairs
Country Club Ballroom

Kevin Brodar*, SMART-TD Union, Cleveland, OH*
Anne B. Shaver*, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA*
Grace E. Speights*, Morgan Lewis & Bockius LLP, Washington, DC*

3:30 – 6:00 pm
Gender Equality InToday's #MeToo World
Country Club Ballroom
The Committee is pleased to present this insightful discussion focusing on gender equality in today's #MeToo world. The first part of this program will take a historical look at the movement for gender equality, including a discussion of key events, important statutes passed (and not passed), and judicial interpretation of those statutes over the last 50 years. The panel will address how these historical and legal issues have culminated in where we are today, including women's marches across the country, the ongoing push for pay parity, and the #MeToo and #TimesUp movements. The second part will discuss the factual events leading up to and constituting the #MeToo and #TimesUp movements, with a particular focus on the perspective of a journalist, including their techniques and experiences in investigating and reporting on these events and the barriers they have faced in publishing the stories. The panel's legal experts also will discuss the movements' impact on employers, including what it means for investigations of harassment claims, anti-harassment policies, and strategies for dealing with the media. The third part will examine the future, and discuss in particular the role that employment laws and lawyers play in helping define gender equality in a post- #MeToo world.

Facilitators:
Nancy L. Abell, *Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA*
Kelly M. Dermody, *Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA*
Melissa S. Woods, *Cohen, Weiss and Simon LLP, New York, NY*

Speakers:
Hon. Victoria Lipnic, *U.S. Equal Employment Opportunity Commission, Washington, DC*
Kathryn Abrams, *University of California at Berkeley, Berkeley, CA*
Dahlia Lithwick, *Newsweek and Slate, New York, NY*
Donald Livingston, *U.S. Department of Justice, Washington, DC*

6:00 – 7:30 pm
Welcome Reception
Country Club Courtyard

7:30 – 10:00 pm
Optional Dine-Around
Sign up to go out to dinner with other Conference participants. A great opportunity to get to know colleagues and new attendees.

Thursday, April 4

7:00 – 9:00 am
Continental Breakfast
Brickell Room

7:00 – 8:55 am
Management and Defense Lawyers Breakfast
Danielson Gallery

Hosts:
Nathaniel M. Glasser, *Epstein Becker & Green, P.C., Washington DC*
Anne-Marie V. Welch, *Clark Hill, PLC, Birmingham, MI*

8:00 – 8:55 am
Employee/Plaintiff Counsel *(Union Counsel Also Welcome)*
Tuttle

Host:
Michael Levin-Gesundheit, *Lieff Cabraser Heimann & Bernstein,LLP, San Francisco, CA*

9:00 – 10:30 am
Spouse/Guest Breakfast (Optional Ticketed Event)
Deering

9:00 – 10:30 am
Government Plenary
Country Club Ballroom
Join top officials from the U.S. Equal Employment Opportunity Commission, U.S. Department of Labor and U.S. Department of Justice as they answer questions from seasoned plaintiff and defense lawyers on topical issues about government litigation, recent court decisions involving their agencies, strategic plans and task forces, and recent and expected agency guidance and Executive Orders.

Facilitators:
Eric D. Reicin, *Morgan Franklin Consulting, LLC, McLean, VA*
Christine E. Webber, *Cohen Milstein Sellers & Toll PLLC, Washington, DC*

Speakers:
Hon Eric Dreiband, *U.S. Department of Justice, Washington, DC*
Hon. Victoria Lipnic, *U.S. Equal Employment Opportunity Commission, Washington, DC*
Hon. Kate O'Scannlain, *U.S. Department of Labor, Washington, DC*
Hon. John Ring, *National Labor Relations Board, Washington, DC*
Craig E. Leen, *Office of Federal Contract Compliance Programs, Washington, DC*

10:30 – 10:45 am
Break

10:45 – 11:00 am
Remarks from Section Leadership
Country Club Ballroom

J. Randall Coffey, *Employer Council Liaison*
Kelly Dermody, *Employee Council Liaison*
Richard Rosenblatt, *Union & Employee Council Liaison*
Joseph E. Tilson, *Section Chair*

11:00 am – 12:15 pm
Resetting Corporate Culture
Country Club Ballroom
The recent wave of high profile allegations of harassment, discrimination and other misconduct directed not only at employees, but also members of the public, has both employers and society at large focused on the prevention of such misconduct. Employers and unions around the country are updating policies, revamping training, and taking remedial action in response to individual instances of bad behavior. But what role does culture play, and is a workplace cultural shift needed to truly bring about lasting change? If so, what can employers, unions and other institutions do to effectuate a change in their culture and in the broader society? This panel of experts will discuss and debate the role of culture in preventing harassment, bias and discriminatory conduct as well as best practices for bringing about lasting change.

Moderator:
Chai R. Feldblum, *Morgan Lewis & Bockius LLP, Washington, DC*

Speakers:
Kristopher Clemmons, Starbucks, Seattle, WA
Rachel D. Godsil*, Perception Institute, Newark, NJ*
Megan Cacace*, Relman, Dane & Colfax PLLC, Washington, DC*

12:15 – 1:30 pm
Diversity Luncheon
Alhambra Ballroom
Join us for a discussion on reducing bias in the legal profession with Judge Bernice Donald of the Sixth Circuit Court of Appeals

Host:
Angie C. Davis*, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Memphis, TN*

Speaker:
Hon. Bernice Donald*, U.S. Court of Appeals for the Sixth Circuit Court, Memphis, TN*

1:45 – 3:00 pm
Track 1: OFCCP At the Crossroads (Again)
Country Club Ballroom
With new leadership now in place, how have things changed at OFCCP, and what remains the same? Have the themes of transparency and collaboration promised by OFCCP's current leadership been implemented in its dealing with covered contractors? With Directive 307 (OFCCP's former guidance on compensation) now rescinded and DIR 2018-05 in its place, has OFCCP's approach to investigating compensation changed and what impact has it had on covered contractors? This panel of experts will explore the latest OFCCP policy updates, as well as any differences in approach to compliance evaluations, and other developing trends.

Moderator:
Robert O'Hara*, Epstein Becker & Green, P.C., New York, NY*

Speakers:
Beverley I. Dankowitz*, U.S. Department of Labor, Washington,DC*
Barry Goldstein*, Of Counsel,* Goldstein, Borgen, Dardarian & Ho, Oakland, CA
Consuela A. Pinto*, Fortney & Scott, LLC, Washington, DC*

1:45 – 3:00 pm
Track 2: Advanced Arbitration in a Post-*Epic* World
Merrick Theater
The Supreme Court recently held in *Epic Systems Corp. v. Lewis* that the Federal Arbitration Act permits arbitration agreements to contain class and collective action waivers, and that neither the FAA's saving clause nor the National Labor Relations Act requires otherwise. This panel will discuss whether and how *Epic* changed the legal landscape, as well as significant recent decisions from the lower courts in the wake of *Epic*. It will explore considerations relating to employers implementing an arbitration agreement requiring individualized proceedings, whether to "force" employees to waive class and collective action rights, strategies for drafting and

enforcing such agreements, and plaintiffs' strategies for addressing class waivers and mandatory arbitration. The session will evaluate a number of remaining uncertainties, including changes at the state and local level, the costs and benefits of arbitrating a large number of claims, the issues and risks associated with potentially having to defend a number of actions on multiple fronts, and how the landscape differs where a union represents employees.

Speakers:
Deirdre A. Aaron*, Outten & Golden LLP, New York, NY*
Richard F. Griffin, Jr.*, Bredhoff & Kaiser, PLLC, Washington, DC*
Andrew Scroggins*, Seyfarth Shaw LLP, Chicago, IL*

3:00 – 3:15 pm
Break

3:15 – 4:30 pm
Track 1: Artificial Intelligence, Algorithmic Management, Technology and Employment Law
Country Club Ballroom
Big Data, machine learning, algorithms and artificial intelligence are increasingly being incorporated into Human Resources tools used for sourcing, recruiting, hiring, and performance management. Companies also are using these tools to enhance employee experience, improve efficiencies, and increase transparency for managers. Yet while these tools promise to reduce the burdens on management and potentially improve results and mitigate bias, they also bring their own risks, particularly in the form of disparate impact from potentially incorporating discriminatory data and/or homophily effects into the underlying HR and management systems, as well as from machines that may "learn" the very biases they aim to reduce. To adequately assess the suitability of these high-tech tools, this panel will begin by addressing how they work, and will then address their potential risks and rewards, as well as the legal and practical implications they pose.

Moderator:
Esther G. Lander*, Akin Gump Strauss Hauer & Feld LLP, Washington, DC*

Speakers:
Ruben Agote*, Cuatrecasas, Barcelona, Spain*
Teresa Hutson*, Microsoft, Seattle, WA*

3:15 – 4:30 pm
Track 2: Age Discrimination – It Never Gets Old
Merrick Theater
Age discrimination and older workers look a lot different than they did 50 years ago, or even a decade ago. More women than men now file ADEA charges. The older workforce is more diverse and living longer, putting off retirement, and having second or third careers. Recent litigation has focused on employers who have launched targeted recruiting campaigns that critics charge discriminate in favor of younger workers, including the placement of recruitment ads on social media that show up only in the news feeds of younger employees. Other employers look upon older employees

as a valuable resource, retaining and attracting such employees, and successfully redesigning their workplaces to accommodate a multi-generational workforce. Plaintiff and union lawyers continue to struggle with defeating the argument that employing younger, less experienced workers is simply a legitimate way to save money. This advanced-level panel will look at these and other current issues.

Moderator:
Barbara J. D'Aquila*, Norton Rose Fulbright LLP, Minneapolis, MN*

Speakers:
Ivelisse J. Berio LeBeau*, Sugarman & Susskind, PA, Coral Gables, FL*
Cathy Ventrell-Monsees, *Equal Employment Opportunity Commission, Washington, DC*
Carolyn Wheeler*, Katz, Marshall & Banks, LLP, Washington, DC*

4:45 – 6:00 p.m.
Suds and Substance: Successful Settlement Negotiations & Mediations
Country Club Ballroom
After a long day stuffing our brains with case sites, data and trial preparation, it'll be time to kick back and engage in a friendly "Family Feud" contest of sorts as we share and broaden our knowledge about the art, craft and comedy of negotiating and mediating settlements. You won't want to miss this interactive happy hour where our master mediator and his co-hosts will invite others to share and learn what goes into successful settlement negotiations and mediations.

Facilitators:
Eric L. Barnum*, Baker & Hostetler LLP, Atlanta, GA*
Marianne G. Robbins, *The Previant Law Firm, Milwaukee, WI*
Melissa L. Stewart*, Outten & Golden LLP, New York, NY*

Speaker:
Michael L. Russell*, Russell Dispute Resolution PLLC, Nashville, TN*

3:15 – 4:30 pm
Networking Reception
Southwest Terrace

3:15 – 4:30 pm
Conference Dinner
Alhambra Ballroom

Friday, April 5

7:00 – 9:00 am
Continental Breakfast
Danielson Gallery

7:00 – 8:00 am
International Breakfast *(All Attendees Welcome)*
Tuttle

Host:
Danny J. Kaufer*, Borden Ladner Gervais LLP, Montréal, QC*

7:00 – 8:00 am
Union & Employee
Brickell

Host:
Kevin Brodar*, SMART-TD Union, Cleveland, OH*

7:00 – 9:00 am
In-House Counsel
Deering

8:15 – 9:30 am
Motions in Limine: A Trial Practice Demonstration
Country Club Ballroom
Motions in limine provide critical gateways for trial, and especially now, in the wake of the #MeToo movement. While #MeToo exploded with a dizzying speed last fall, the phrase has long held legal significance in civil litigation of discrimination and harassment claims. Because many claimants rely on circumstantial evidence, they seek to bring in “me too” evidence of other instances of discrimination or harassment by the alleged harasser or same employer in support of their claims. Whether such evidence is admissible depends on many factors, which may vary from court to court. Join us as we watch two experienced practitioners argue a motion in limine over “me too” evidence, and the judge who will make the reasoned ruling.

Moderator:
Richard Rosenblatt*, Rosenblatt & Gotsch, PLLC, Greenwood Village, CO*

Speakers:
Hon. Mary S. Scriven*, U.S. District Court for the Middle District of Florida, Tampa, FL*
Jon W. Green*, Green Savits, LLC, Florham Park, NJ*
Andrew S. Rosenman*, Mayer Brown, LLP, Chicago, IL*

9:45 – 11:00 am
EEO Year In Review: The Top Cases of 2018-2019
Country Club Ballroom
Which were the most important and impactful EEO cases over the past year, and how will they shape employment law going forward? Which cases on the horizon warrant our attention, and how are they likely to be decided? Join two extremely knowledgeable lawyers (one from the plaintiff bar and one from the

defense) as they provide their perspectives on the year's key EEO cases nationwide that have (or should have) attracted our attention.

Moderator:
Katherine "Alex" Roe, *Communication Workers of America, Washington, DC*

Speakers:
J. Randall Coffey, *Fisher Phillips, LLP, Kansas City, Missouri*
Michael C. Subit, *Frank, Freed, Subit & Thomas, LLP, Seattle Washington*

11:15 am – 12:45 pm
Track 1: Pay Equity Here and Abroad
Country Club Ballroom
The patchwork of state equal pay laws and international pay transparency requirements continues to grow, not only creating new compliance and legal obligations, but also increasing the pressure for employers to ensure internal pay equity and address or explain existing pay gaps. On the international front, the UK, Germany and Iceland are leading the way with new laws and regulations impacting multi-national companies, while states such as California, Massachusetts and New Jersey continue further complicate the equal pay landscape within the U.S. This panel will address the latest state and international developments, with a particular focus on policy issues, such as whether Congress should amend the Equal Pay Act to create a federal statute that preempts state and local pay laws; whether the EEOC should defer pay charges to state agencies that have effective processes and more expansive pay legislation; and whether there should be a safe harbor for companies that voluntarily conduct pay audits or make pay equity disclosures.

Moderator:
Erin M. Connell, *Orrick, Herrington & Sutcliffe LLP, San Francisco, CA*

Speakers:
Jennifer L. Liu, *The Liu Law Firm, P.C., Menlo Park, CA*
Heidi B Retzlaff, *GE Healthcare, Milwaukee, WI*
Yona Rozen, *AFL-CIO, Washington, DC*

11:15 am – 12:45 pm
Track 2: The Immigrant Workforce Under Trump: Changes Impacting Foreign Workers and Those Who Employ Them
Merrick Theater
Recent developments, from the shift in focus by U.S. Department of Justice's Immigration and Employee Rights Section away from protecting immigrant workers to instead protecting American workers, the changes to employment authorizations and visas for spouses, students and professionals, increased I-9 audits and employer worksite inspections by Immigration and Customs Enforcement, dangers of travel for foreign workers, and delays in processing and procedures, are having a radical impact on getting and retaining workers. Join us for a discussion focusing on the latest in immigration issues in the workplace.

Speakers:
Hon. Charlotte Burrows, *Equal Employment Opportunity Commission, Washington, DC*
Sean G. Hanagan, *Jackson Lewis P.C., White Plains, NY*
Paul Chavez, *Southern Poverty Law Center Immigrant Rights Project, San Francisco, CA*
Marley Weiss, *University of Maryland, Baltimore, MD*

12:45 – 2:15 pm
Lunch on your own

2:15 – 3:30 pm
Track 1: Precarious Workers: Will the U.S. Follow Europe's Lead?
Country Club Ballroom
While the United States has seen little change in the working conditions of the precarious worker, many Americans would be surprised to learn how the Fight for Fifteen has become a rallying cry around the world. Different jurisdictions have raised minimum wages to the $15 range and passed legislation protecting agency workers from being paid less than regular hourly paid employees. The United Kingdom and Germany also have passed pay transparency legislation to protect against pay inequities, between not only males and females within the same jobs, but also between given categories of jobs. These are not just isolated amendments. While much of this has been achieved by national legislation in foreign jurisdictions, the U.S. has achieved some gains on the state and local level through statute or ordinance. In addition, these categories of employees and workers alike have forced trade unions to shed their traditional areas of comfort and play a different role for these types of workers. Agreements akin to decrees which exist in France and the province of Quebec have been reached with companies in the cleaning and ride sharing industries, to name but two, in the U.S., Canada and Denmark. Our panel of experts will examine why foreign jurisdictions have taken the lead in this area and, at the same time, focus on the laws passed and new relationships forged by trade unions in both the United States and the European Union to afford these workers rights and protections.

Moderator:
Danny J. Kaufer, *Bordon Lardner Gervais, Montréal, QC*

Speakers:
Shaylyn Cochran, *Cohen Milstein Sellers & Toll PLLC, Washington, DC*
Russell Rochford, *Matheson, Dublin, Ireland*
Stephen B. Moldof, *Cohen, Weiss and Simon LLP, New York, NY*

2:15 – 3:30 pm
Track2: Advanced EEO Class Actions and Pattern or Practice Claims
Merrick Theater
Both plaintiffs and government agencies continue to bring a broad range of EEO class actions and pattern or practice claims, with recent class certification decisions across the country offering new impetus to both plaintiff and defense counsel. This panel will address the myriad of complex issues posed in these decisions, including potential conflicts in classes that combine non-managers and managers; the extent to which Rule 23 commonality requirements overlap with the substantive requirements of pattern or practice claims; whether an employer's practice involving individual managers' discretion defeats class and pattern or practice claims; differences between pay and promotions claims; and the role of statistical regressions in class-wide cases involving employees in different positions and/or locations.

Speakers:
Jessica R. Perry*, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA*
Anne B. Shaver*, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA*

3:30 – 3:45 pm
Break

3:45 – 5:00 pm
Employment Trainings: What Works, What Doesn't, And At What Risk?
Country Club Ballroom
Sexual harassment, implicit bias, and diversity and inclusion trainings have been making headlines, ranging from Starbucks closing their stores to conduct mandatory in-person bias training, to recent recommendations by the U.S. EEOC, to studies showing that some sexual harassment, implicit bias, and mandatory diversity trainings are ineffective, and in some cases can actually perpetuate the biases they seek to address. This panel will explore the research on which trainings have failed, and which have lead to return on investment – and how to measure those returns. We'll also hear from panelists on the trainings they have conducted and developed, what has and has not worked, and how we can move from "ticking the box" to providing trainings with measured impact.

Moderator:
Julie Richard Spencer*, Robein, Urann, Spencer, Picard & Cangemi, APLC, Metairie, LA*

Speakers:
Nicole Groves*, Facebook, Menlo Park, CA*
Rae T. Vann*, N. T. Lakis, Washington, DC*

5:15 – 6:00 pm
Committee Feedback Meeting
Country Club Ballroom

6:30 – 7:30 pm
Networking Reception Honoring Conference Speakers, *EDL* Editors and Chapter Monitors, Followed by Dinner on Your Own

Saturday, April 6

7:30 – 8:30 am
Continental Breakfast
Danielson Gallery

8:30 – 9:45 am
Advanced Accommodations in the Modern Workplace
Country Club Ballroom
As technology advances, the needs of companies and employees change as well. This panel will look at the advances of adaptive technology at work and answer the burning questions of today. Must companies accommodate medical marijuana use under state law? Do all service animals qualify as emotional support animals? Does the ADA make having a company website more trouble than it's worth?
What if the workplace goes viral for the wrong reasons? In this hour, our panel will discuss how the modern workplace continues to be shaped by technology and quickly changing laws.

Moderator:
Kevin Brodar, *SMART-TD Union, North Olmstead, OH*

Speakers:
Julia Campins, *Campins Bencham-Baker, PC, Lafayette, CA*
Michelle P. Crockett, *Miller, Canfield, Paddock and Stone, PLC, Detroit, MI*

10:00 – 11:15 am
The Unraveling of the Regulatory State
Country Club Ballroom
Regulatory reform and changes to address the ever-expanding regulatory state have been a top priority for the Trump Administration. These regulatory roll- back efforts are taking place across the government, including executive orders requiring federal agencies to repeal two regulations for each new regulation issued, as well as to determine whether any rules and regulations are outdated and no longer apply, and whether the burdens the agencies are imposing outweigh the benefits. Within this climate, OFCCP has issued no new regulations, and EEOC's attempts to publish guidance on workplace harassment have been pending with the Office of Management and Budget and not authorized for publication. These regulatory reform efforts also are reflected in sub-regulatory guidance and litigation positions, including amicus briefs filed by the U.S. Department of Justice supporting a baker's religious rights to not provide a cake for a gay couple's wedding, and challenging Harvard University's affirmative action student admission programs – both illustrating roll-backs of the Obama Administration's positions. This panel of experts will discuss these developments and their impact, as well as what the future holds for workplace discrimination standards and EEO enforcement as the regulatory changes continue.

Moderator:
David S. Fortney, *Fortney & Scott LLC, Washington, DC*

Speakers:
Terri Guttman Valdez, *Terri Guttman Valdez LLC, Coral Gables, FL*
Jenny R. Yang, *Open Society Foundations, Washington, DC*

11:30 am – 12:30 pm
Front Page News: Ethical Challenges of High Profile Cases
Country Club Ballroom
The ethical challenges of litigating high-profile employment cases are more complex than ever, particularly in today's climate, with the #MeToo movement and issues of gender equality and pay equity constantly in the spotlight. The ethics of when and how to use a public relations firm, the appropriate role of the press in ongoing litigation, what lawyers can say publicly – including on social media – about their cases, and whether the standards differ for employees and employers present complicated questions without easy answers. Join our panel of experts as they discuss and debate these timely ethical dilemmas of litigating cases in the media.

Speakers:
Lisa J. Banks, *Katz. Marshall & Banks LLP, Washington, DC*
Melinda S. Riechert, *Morgan Lewis & Bockius LLP, Palo Alto, CA*

View Program Materials at
www.ambar.org/EEOpapers

(Note the address is case-sensitive)

From: Meacham, Christopher
To: Ring, John
Subject: ABA National Conference on Equal Employment Opportunity Law
Date: Monday, April 1, 2019 5:12:31 PM
Attachments: Roster.pdf
Agenda FINAL.PDF

Dear Equal Employment Opportunity Law Conference Registrants:

Please find attached the Agenda and Roster for the 2019 ABA National Conference on Equal Employment Opportunity Law.

Papers and other meeting materials are available online at www.ambar.org/EEOpapers . (NOTE: Paper copies will not be provided at the meeting.)

We look forward to seeing you in Coral Gables!

Christopher A. Meacham
Assistant Director
Section of Labor and Employment Law
American Bar Association
321 North Clark Street
Chicago, Illinois 60654
T: 312.988.5821

christopher.meacham@americanbar.org
www.americanbar.org

Subject: FW: 36th Annual Carl A. Warns, Jr. & Edwin R. Render Labor and Employment Law Institute - SPEAKER INFORMATION

Date: Monday, April 1, 2019 7:10:12 PM

Attachments:
image001.png
image002.png
image003.png
image004.png
Warns Program Draft 3.20.19.docx
Speaker Info Letter 2019 docx.doc

THURSDAY, JUNE 27, 2019

7:45 AM **Registration**

8:15 AM **Welcome**
Dean Colin Crawford
University of Louisville Brandeis School of Law

8:30 AM **Review of Kentucky Employment Law Cases**
Alina Klimkina
Dinsmore & Shohl LLP

9:30 AM **NLRB Update**
Chairman John Ring
National Labor Relations Board

10:30 AM **Break**

10:45 AM **Arbitration Agreements in Kentucky**
Lauren Sanders
Vorys, Sater, Seymour and Pease LLP

Shane Sidebottom
Ziegler & Schneider PSC

11:45 AM **Lunch**

12:45 PM **Carl A. Warns Jr. Keynote Speaker: Whistleblowing, Social Media, and the Duty of Loyalty: The Changing Employment Relationship**

Eugene Scalia
Gibson, Dunn & Crutcher LLP

1:45 PM **Review of U.S. Supreme Court Labor and Employment Cases**
Professor Peggie Smith *Washington University in St. Louis School of Law*

2:45 PM **Break**

3:00 PM **Economics of Settling Employment Litigation**
John Hays
Mediator

Rebekah McGuire Dye
Equian LLC

4:00 PM **Ethics of Collective Bargaining & Professional Responsibility**
Brian Balonick
Cozen O'Connor P.C.

FRIDAY, JUNE 28, 2019

8:30 AM **Kentucky Workers' Compensation Update**
Commissioner Robert L. Swisher
Department of Workers' Claims

Stephanie N. Wolfinbarger
Cotton, Wolfinbarger & Associates, PLLC

James G. Fogle
Fogle Keller Walker PLLC

9:30 AM **Department of Labor Update**
Katherine Bissell
Office of the Solicitor, U.S. Department of Labor

10:30 AM **Break**

10:45 AM **Objection! Evidentiary Issues in Employment Litigation Panel**
Professor Emerita Christine Cooper
Loyola University Chicago School of Law

Chief Judge Rebecca Pallmeyer
U.S. District Court Northern District of Illinois

Ben Basil
Priddy Cutler Naake & Meade, PLLC

12:15 PM **Lunch**

1:15 PM **EEOC Update**
Jennifer S. Goldstein
Office of General Counsel, U.S. Equal Employment Opportunity Commission

2:15 PM **Religious Accommodation in the Workplace**
Jeanne Goldberg
Office of Legal Counsel, U.S. Equal Employment Opportunity Commission

Sheree Wright
Vanderbilt University Office of the General Counsel

3:15 PM **Break**

3:30 PM **Eliminating Microaggressions and Creating Inclusive Environments**
Whitney Meagher
LG&E

Dr. Monica Lakhwani
Jefferson County Public Schools

4:30 PM **Ethics: Who is the Client?**
Peter L. Ostermiller
Peter L. Ostermiller Attorney at Law

UNIVERSITY OF LOUISVILLE
BRANDEIS SCHOOL OF LAW

Law School
http://louisville.edu/law

April 1, 2019

Dear Warns - Render Speaker:

Thank you for agreeing to speak at the University Of Louisville Brandeis School Of Law's *36th Annual Carl A. Warns and Edwin R. Render Labor and Employment Law Institute*, June 27 – 28, 2019. I write to provide information about travel and lodging arrangements and request information from you.

Travel and Lodging

The hotel where the conference is being held:

Seelbach Hilton Louisville Hotel
500 South Fourth Street
Louisville, Kentucky, 40202

The School of Law **must** make hotel/airline arrangements on your behalf. Please contact Kristina Arnold at your earliest convenience, kristina.arnold@louisville.edu, 502-852-1669. If you have other travel related expenses, please be sure to save and submit receipts to us after the event.

Speaker Bios and Materials

Please complete and submit the following items by **May 27, 2019**:

☑ A one-page biography.

☑ Course materials, which must be provided to conference attendees to qualify for CLE credit. Course materials can include a detailed outline of your presentation, a reprint of an article addressing the topic of your presentation, PowerPoint's that link to more extensive information available online, or other similar materials.

☑ Audiovisual Services Questionnaire for Guest Speakers at http://louisville.edu/law/it/av-services-for-guests Please complete and submit the Audiovisual Services Questionnaire by **Monday, May 27, 2019**.

☑ Review the nine *Speaker Requirements* (scroll to next page).

Please remember to hold the evening of Thursday, June 27th for the speakers' dinner. More information will be forthcoming. We look forward to seeing you in June.

Sincerely,

Ariana R. Levinson

Ariana Levinson
Co-Chair, Warns - Render Institute Planning Committee

SPEAKER REQUIREMENTS

1.) Relax and enjoy the opportunity to speak to a room full of knowledgeable colleagues! Your audience will be practicing labor and employment lawyers, with a smattering of HR and union officers. A joke, a funny story, an anecdote, or a personal aside often distinguishes the memorable presentation from a straightforward exposition on the law.

2.) Check in with the registration table 30 minutes in advance of your presentation. It is imperative that the Institute administrators know that all speakers are in place to coordinate any audio visual needs and avoid last minute confusion. This applies equally to local speakers.

3.) Presenters are given a three minute introduction by a member of the local bar, who also serves as timekeeper and moderator for the presentation. Being on site early allows the speaker and moderator to meet, contributing to a more personalized introduction. File your bio by the deadline so it can be forwarded to your moderator.

4.) The Warns Institute prides itself on presenting a full program of distinguished speakers and panelists, assuring that each has the opportunity which was promised. Sessions start and end on time. Design and practice your presentation so it can be completed within the time allotted. The moderator, who will be seated at the podium, will give a 5 minute alert and is then charged with closing the presentation, respectfully, on schedule. The next speaker and moderator will be at the foot of the stage for a seamless transition.

5.) Time for questions is strongly encouraged. Your moderator will ask if you want to reserve time. If so, your presentation time should be altered accordingly, and you will get the 5 minute warning prior to the beginning of Q&A. If you would like to provide a question, the Institute administrators can insure that an audience member leads with your planted question. Additionally, moderators are encouraged to prepare a question to stimulate discussion.

6.) An interactive approach is also welcome. You can choose to take questions throughout and should feel free to pose questions to the audience (plan for a back-up to answer your own questions if the audience is shy). If you are interested in using an automated response system, the Institute administrators can work with you to see if this is feasible. This system enables the audience to respond to questions by pressing a number on their phone. Questions can be Y/N, T/F or Multiple Choice.

7.) If your presentation takes a multistate perspective, customize to include Kentucky's perspective on those same issues.

8.) Materials will be available to attendees online. Visual presentation of quotes, charts or other graphics will be most effective without reference to the written materials.

9.) If you use visuals, such as PowerPoint, try the following to enhance your presentation. 1) Use a black on white or white on black format for ease of viewing. Avoid red and green which are difficult for the color blind. 2) For text, use short phrases rather than full sentences. 3) When using quotations or excerpts, place them in large font and provide time for the audience to read them. 4) Vary the format of the slides and integrate visuals other than simply text.

From:	Ring, John
To:	Bashford, Jo Ann
Subject:	FW: 36th Annual Carl A. Warns, Jr. & Edwin R. Render Labor and Employment Law Institute - SPEAKER INFORMATION
Date:	Monday, April 1, 2019 7:11:00 PM
Attachments:	image001.png image002.png image003.png image004.png Warns Program Draft 3.20.19.docx Speaker Info Letter 2019 docx.doc

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I can't tell if you got this, but it looks like they want to make airline reservations.

From: Cole,Tracie L. <tracie.cole@louisville.edu>
Sent: Monday, April 1, 2019 12:06 PM
To: Cole,Tracie L. <tracie.cole@louisville.edu>
Subject: 36th Annual Carl A. Warns, Jr. & Edwin R. Render Labor and Employment Law Institute - SPEAKER INFORMATION
Importance: High

Dear 2019 Warns – Render Labor and Employment Law Speakers:

Thank you for agreeing to speak at the upcoming University of Louisville Brandeis School of Law's *36th Annual Carl A. Warns, Jr. & Edwin R. Render Labor and Employment Law Institute.* We anticipate another successful year, thanks to all of you!

I have attached a preliminary schedule and information pertinent to you as a speaker. Please let me know if you have any questions, and I hope to hear from you soon.

Thank you,

Tracie

Tracie L. Cole – Director, Law Resource Center & Events Coordinator, University of Louisville Brandeis School of Law
tracie.cole@louisville.edu / +1-502-852-1230 [Tel] / +1-502-852-7299 [Fax]

Visit our website: www.louisville.edu/law
BRANDEIS SCHOOL OF LAW

From: Employment Law360
To: Ring, John
Subject: DOL Joint Employer Push Has Worker Advocates Up In Arms
Date: Tuesday, April 2, 2019 3:43:33 AM

EMPLOYMENT

Tuesday, April 2, 2019

TOP NEWS

DOL Joint Employer Push Has Worker Advocates Up In Arms

The U.S. Department of Labor on Monday proposed a four-part test for determining when businesses jointly employ workers under the Fair Labor Standards Act, winning plaudits from the management bar but drawing criticism from plaintiffs lawyers who said the agency ignored court precedent that took an expansive view of joint employment.

Read full article »

High Court Turns Away 4 Employment Cases

The U.S. Supreme Court turned away four employment appeals Monday, including petitions challenging a National Labor Relations Board ruling letting off-duty workers picket near a hospital entrance and an en banc Ninth Circuit ruling letting a Washington flight attendant press her fight to use vacation time to take care of her sick child.

Read full article »

3rd Circ. Says Outdated ADA Reading Can't Spur New Trial

A Delaware nonprofit can't get a new trial over an ex-employee's claim that it refused to accommodate her dyslexia, even though she had originally won based on the parties' outdated interpretation of the Americans with Disabilities Act, the Third Circuit ruled Monday.

Read full article »

Pryor Cashman Can't Dodge Ex-Associate's Age Bias Suit

A New York federal judge has refused to let Pryor Cashman LLP escape a former associate's age discrimination suit, saying a jury should decide whether he was wrongly sacked after 18 years or let go because of poor performance.

Read full article »

McDermott Latest Firm To Ditch Mandatory Arbitration Policy

McDermott Will & Emery is the latest BigLaw firm to drop mandatory arbitration agreements for all employees, a reform that has gained increasing support across the legal industry in the wake of the #MeToo movement.

Read full article »

Ex-Liberty Exec Wins Back $1.27M Benefits Package

A New York federal judge on Sunday ripped Liberty Mutual for its "deception" and "lack of candor" in retroactively canning a longtime executive months after he resigned to join a competitor, ordering the insurer to pay him the $1.27 million in benefits the postdated firing cost him.

Read full article »

DISCRIMINATION

Analysis

HUD Charge Could Force Facebook To Rein In Algorithms

Attorneys who recently pushed Facebook to overhaul its advertising platform

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New Cases

Discrimination (26)
ERISA (33)
Labor (39)

LAW FIRMS

Altshuler Berzon LLP
Arnold & Porter
Berger Montague
Bredhoff & Kaiser
Carothers DiSante
Cohen Milstein
Cole Schotz
Consovoy McCarthy
Cravath Swaine
DLA Piper
Dorsey & Whitney
Fisher Phillips
Fuqua Willard
Gombos Leyton
Kerr & Wagstaffe
Kirkland & Ellis
Littler Mendelson
Mayer Brown
McDermott Will
Miller Canfield
Morgan Lewis
Munger Tolles
Offit Kurman
Ogletree Deakins

say claims leveled by the U.S. Department of Housing and Urban Development last week could force the social media giant to take action on a deep-rooted obstacle to combating ad discrimination online: inherent bias in machine learning.

Read full article »

WAGE & HOUR

$7.5M Comcast Wage Deal Falls Short, Judge Says

A California federal judge on Monday rejected a proposed $7.5 million deal that would have resolved claims that Comcast and a nationwide cable installation contractor shorted 4,500 technicians' overtime pay, saying the deal needs better assurances that the violations won't happen again.

Read full article »

LABOR

6th Circ. Urged To Revive Fiat Chrysler, Union Collusion Suit

Auto workers told the Sixth Circuit on Friday that they have the right to privately sue Fiat Chrysler and the United Automobile Workers for allegedly colluding to sacrifice workers' interests during collective bargaining, and that going through the union's grievance process would be useless.

Read full article »

NLRB Defends Mexichem Unit's Plant Closure At DC Circ.

The National Labor Relations Board has urged the D.C. Circuit to reject a United Steelworkers' challenge to the board's finding that a Mexichem subsidiary closed a Kentucky plant because of business pressures, not to punish a union representing workers there.

Read full article »

WHISTLEBLOWER

DOJ's Novartis Kickback Case Cleared For Trial

The U.S. Department of Justice has adequately described a "companywide kickback scheme" at Novartis Pharmaceuticals Corp. to pump up prescriptions, a New York federal judge said in a ruling released Monday that allows the enormous False Claims Act case to continue toward trial.

Read full article »

Justices Won't Review 9th Circ. Toss Of Honeywell FCA Suit

The U.S. Supreme Court declined Monday to review a Ninth Circuit ruling that affirmed the tossing of a $45 million False Claims Act suit from a U.S. Army engineer and other whistleblowers alleging Honeywell falsified energy savings estimates to win a contract.

Read full article »

High Court Again Refuses To Revisit FCA Materiality

The U.S. Supreme Court on Monday turned down a California art school's request to clarify requirements for demonstrating materiality in False Claims Act cases, as originally set out in its landmark Escobar ruling, the latest in a series of similar rejected petitions.

Read full article »

PEOPLE

Fisher Phillips Picks Up Employment Pro From Seeley Savidge

Fisher Phillips has added a versatile labor and employment attorney from Seeley Savidge Ebert & Gourash Co. LPA as a partner in its Cleveland office.

Read full article »

Orrick Herrington
Paul Hastings
Perkins Coie
Pryor Cashman
Schneider Wallace
Seeley Savidge
Sidley Austin
Skadden
Sterling Attorneys at Law
Sullivan & Cromwell
The Jaffe Law Firm
Venable LLP
Vladeck Raskin

COMPANIES

AT&T Inc.
AbbVie Inc.
Allergan PLC
American Airlines Group Inc.
American Bar Association
American Civil Liberties Union
American Express Co.
American Federation of Labor and Congress of Industrial Organizations
Apple Inc.
Aspen Insurance Holdings Ltd.
Atrium Health
BuzzFeed Inc.
Comcast Corp.
FCA US LLC
Facebook
Federation Internationale de Football Association
General Motors
Honeywell International Inc.
Instagram Inc.
JAMS Inc.
LINE Corp.
Liberty Mutual Insurance Group
Mexichem S.A.B. de C.V
National Association of Attorneys General
National Basketball Association
National Fair Housing Alliance
New York State Bar Association
New York University
Novartis AG
Office Depot Inc.
Purdue Pharma LP
SunEdison LLC
Sutter Health
United Auto Workers
United States Soccer Federation

EXPERT ANALYSIS

Equal Pay Day And The US Pay Equity Landscape

Tuesday is Equal Pay Day, symbolizing how far into the current year women must work to reach the same level of compensation that men earned in the prior year. With this in mind, Dan Forman of Carothers DiSante discusses recent Equal Pay Act lawsuits and what to expect in this area going forward.

Read full article »

Highlights From 2019 ABA Antitrust Spring Meeting: Part 1

The American Bar Association's antitrust meeting last week featured several sessions with representatives from federal and state antitrust enforcement agencies, and provided signals regarding current and future priorities, say attorneys with Perkins Coie.

Read full article »

LEGAL INDUSTRY

Orrick Atty Accused Of Creating Phony Bills For SunEdison

An Orrick partner altered firm invoices worth $2.28 million for teetering clean energy giant SunEdison so the company could fraudulently draw off a line of credit to pay the firm's long overdue bills, according to a Friday federal bankruptcy court filing.

Read full article »

Women Attys Group Fires Back After DOJ Nominee's Exit

The National Association of Women Lawyers came out swinging Monday after President Donald Trump's nominee for the U.S. Department of Justice's third-highest rank came under fire for her connections to the group, saying U.S. Attorney Jessie Liu should not have to withdraw her name.

Read full article »

Judge In Manafort Trial Escapes Complaints Over Comments

A Virginia federal judge escaped four judicial conduct complaints related to comments he made while presiding over Paul Manafort's criminal trial after the Fourth Circuit concluded that he may have been "injudicious" but did not commit misconduct, according to an order posted online Monday by BuzzFeed News.

Read full article »

Judge Who 'Lived And Breathed Civility' Inspires ABA Award

Judge William D. Missouri "lived and breathed civility and courtesy," and the late Maryland state jurist's colleagues said he did more than practice what he preached — he wanted to help others follow the same path.

Read full article »

NY Bar To Probe Impact Of Shift To Uniform Atty Exam

The New York State bar said Monday it will examine how the state's move to a uniform bar exam has affected the quality and diversity of lawyers, again suggesting the exam was adopted without adequate information on its possible consequences.

Read full article »

Interview

15 Minutes With Boston Globe Media Partners' GC

Before joining Boston Globe Media Partners in 2017, Dan Krockmalnic was an assistant attorney general in Massachusetts, a role that included helping to uphold the state's assault weapons ban. In a recent interview, he said adapting to the GC role is ongoing after what he called an "extraordinarily" steep learning curve when he started at the company.

Read full article »

Inc.
United Steelworkers
Universal Health Services Inc.
ViroPharma Incorporated
WNBA Enterprises LLC
Wal-Mart Stores Inc.
Women's National Basketball Players Association

GOVERNMENT AGENCIES

Federal Trade Commission
Internal Revenue Service
Massachusetts Attorney General's Office
National Labor Relations Board
U.S. Army
U.S. Attorney's Office
U.S. Department of Education
U.S. Department of Housing and Urban Development
U.S. Department of Justice
U.S. Department of Labor
U.S. Department of the Treasury
U.S. Office of Personnel Management
U.S. Postal Service
U.S. Supreme Court
United States Bankruptcy Court for the Southern District of New York
United States Court of Appeals for the Third Circuit
Virginia Attorney General's Office
Wage and Hour Division

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Seattle, Washington

Employment Associate / NY mid-size law firm
Schoen Legal Search
New York, New York

Associate Attorney
O'Hagan Meyer
Newport Beach, California

Labor & Employment Associate
McGuireWoods LLP
-, -

Career Associate (Stamford Office)
McCarter & English, LLP
Stamford, Connecticut

NYC Big-Law litigation assoc (3-4 yrs exp)
KLR Davis
New York, New York

L&E Partner -Mid-sized NYC law firm
Schoen Legal Search
New York City, New York

Labor & Employment Associate
McCarter & English, LLP
-, -

Career Associate (Stamford Office)
McCarter & English, LLP
Stamford, Connecticut

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Labor Department to Limit Franchiser, Staffing Wage Liability
Date: Tuesday, April 2, 2019 7:09:48 AM

What you need to know to start your day.

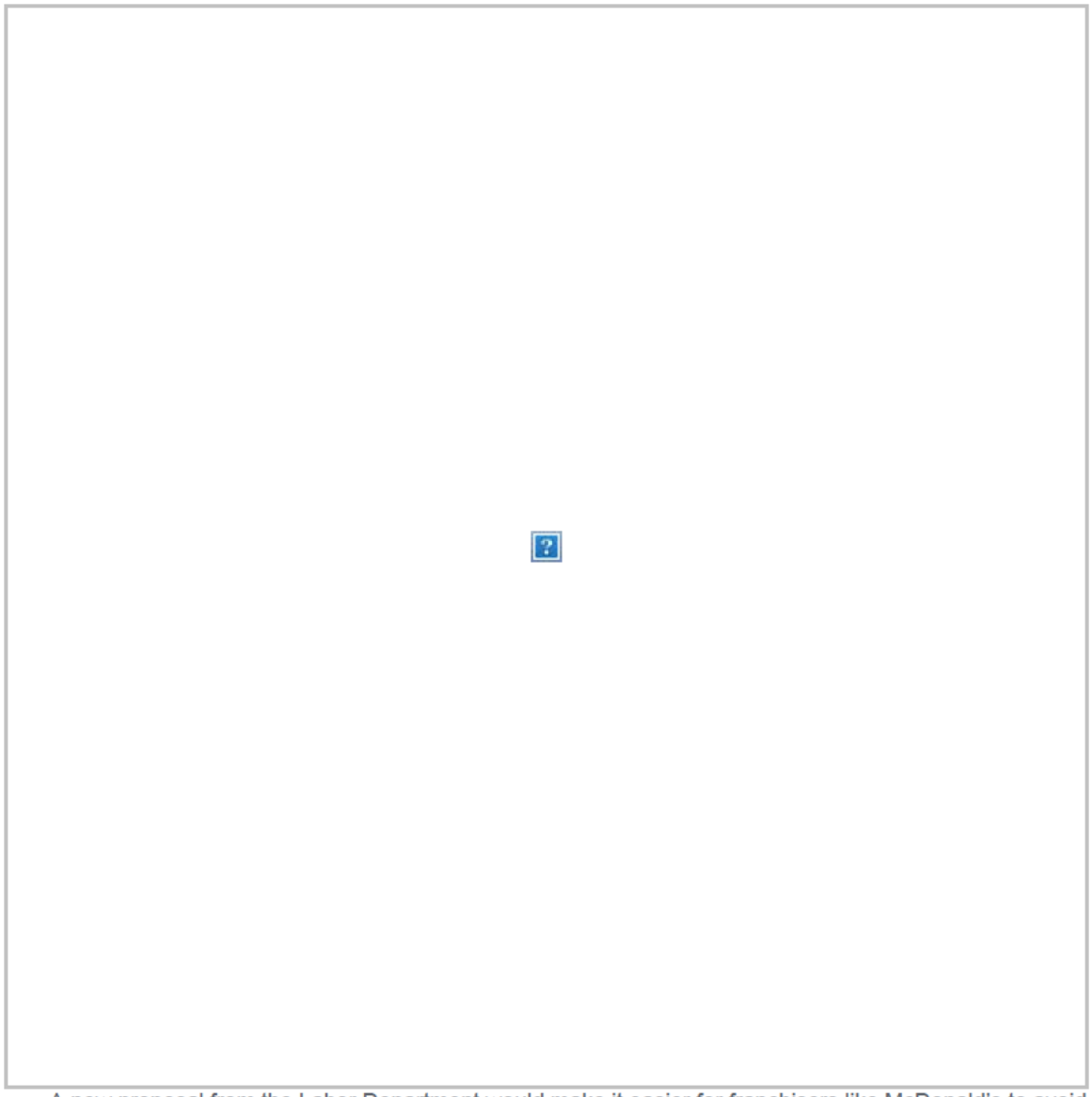
Labor Department to Limit Franchiser, Staffing Wage Liability

By Patricio Chile

The Labor Department yesterday proposed a new regulation to limit "joint employer" liability for franchisers and businesses that use workers provided by staffing firms.

- **Proposed Test:** The DOL says a proposed four-factor test for determining whether one company is a joint employer of another employer's workers is an "official interpretation" of wage and hour requirements under the Fair Labor Standards Act. It's unclear what weight judges will give the regulation in court,

- **Board Regulation:** The move comes as the National Labor Relations Board is working on its own regulation to restrict joint employer liability for collective bargaining and unfair labor practice purposes, Chris Opfer and Jaclyn Diaz report.



A new proposal from the Labor Department would make it easier for franchisers like McDonald's to avoid wage and hour cases involving franchisee workers.
Photo by Christoph Schmidt/picture alliance via Getty Images

PAY TRANSPARENCY ACTIONS MARK EQUAL PAY DAY

Today marks Equal Pay Day—or how far into the year women must work to earn what men earned in the previous year, according to the National Committee on Pay Equity. The date this year comes at a time when lawmakers and federal agencies are looking at pay transparency and employers' pay data. House Democrats last week passed the Paycheck Fairness Act, designed to tackle pay disparaties. The EEOC meanwhile has until tomorrow to tell employees if they have to turn over worker pay data.

- **Deadline Looms:** The EEOC's deadline for collecting annual workforce

surveys is currently May 31, and employers have questioned whether the agency will be able to collect the pay data before that date.

- **State Actions:** At the state and local level, some 13 states and 13 cities have passed legislation to address pay disparity by limiting inquiries into workers' pay history.

WHAT ELSE WE'RE WATCHING

- **Bike-Share Unions:** Employees who service San Francisco's Ford GoBike system voted to join a growing list of **unionized bike-share** workers. Read about this and more in our weekly roundup of union news, "Unions at Work."

- **Equality Act:** The House Judiciary Committee today takes up the Equality Act, legislation that would ban **sexual orientation** and **gender identity** bias on the job and in public accommodations. Co-sponsored by 237 Democrats and 3 Republicans, the bill is a key part of the Democrats economic policy agenda this Congress.

- **New NAFTA:** A proposed trilateral trade agreement between the U.S., Mexico, and Canada is set to fail in Congress if the Trump administration pushes a vote in the next few months, the president of the **AFL-CIO** said. Andrew Wallender has the story.

- **DOJ Withdrawal:** Jessie Liu's withdrawal from the running to be the DOJ's No. 3 after she was criticized over her past role with the National Association of Women Lawyers could have a **chilling effect** on women and minority lawyers joining identity-based groups.

- **Mouse Problem:** Environmental tests obtained by Bloomberg Law indicated elevated levels of **mouse allergens** at the Labor Department's Frances Perkins building in Washington, Jaclyn Diaz reports today.

- **Vocational Experts:** The U.S. Supreme Court refused to adopt a categorical rule that would have allowed courts to second-guess **Social Security vocational** experts, Kimberly Strawbridge Robinson reports.

DAILY RUNDOWN

Top Stories

Agency Waited Too Long to Contest Worker's Bias Theory
A Delaware community action agency must pay a former employee $22,501 for disability discrimination even though she prevailed on an outdated legal theory, the Third Circuit ruled.

County Employee Demoted for Testifying Loses Free Speech Case
The First Amendment rights of a county employee weren't violated when he was demoted for testifying as a character witness on behalf of his sister-in-law in a child custody dispute with another county employee, the Tenth Circuit ruled.

AT&T Worker Gets Trial by Pointing to Second FMLA Leave Policy
A jury must decide whether a sales consultant at an AT&T store in Kentucky gave the company timely notice of her use of job-protected medical leave, a federal judge ruled.

Discrimination

Pryor Cashman Must Face Trial on Older Lawyer's Bias Claims
A trusts and estates attorney may be able to show Pryor Cashman LLP fired him at age 61 because it wanted younger associates it could groom to be partners, a federal judge ruled.

Apple, Airbnb, Other Employers Take California Pay Equity Pledge
Apple Inc. and Salesforce.com are among 13 companies pledging to review pay, hiring, and promotion practices to identify potential bias and close the wage gap in California.

Wage & Hour

JFK Workers' $2.5M Wage Settlement Hits Road Block
A federal judge in New York declined to sign off on a proposed settlement between Allied Universal Security Services and a set of security guards and supervisors at John F. Kennedy International Airport, saying the parties hadn't filed necessary information with the court.

Panera Settles Class Action Wage Lawsuit for $2 Million
Panera Bread Co.'s $1.99 million settlement of a class action employment case

was approved by a federal court.

State & Local Laws

[$12 Minimum Wage Law Signed in New Mexico]
New Mexico will boost its state minimum wage to $12 an hour by 2023 and increase pay for tipped workers.

[West Virginia 'Right-to-Work' Law Gets New Legal Life—for Now]
A state court ruling that struck down West Virginia's "right-to-work" law was put on hold.

Labor Relations

[Off-Duty Picketing at Hospital Won't Get High Court Look]
The U.S. Supreme Court won't take up an appeal on whether federal labor law protects off-duty hospital workers who held stationary picket signs on medical center property.

WORKFLOWS

Reed Smith said that former federal prosecutor and Wisconsin Deputy Att'y General Paul Connell joined its State AG team in Washington, and former Baker Hostetler counsel Aaron R. Lancaster joined the IP, Tech & Data Group in Chicago | **Ogletree Deakins** added Bryan Cave Leighton Paisner worklaw attorney Leslie Helmer as a shareholder in Los Angeles | Carlton Fields' hired attorney Andrew Hinkes to the blockchain and digital currency practice in Miami | **Drinker Biddle & Reath** announced that Kimberly A. Jones has joined the firm's Employee Benefits and Executive Compensation Group in Chicago from Ogletree Deakins

For all of today's Bloomberg Law headlines, visit Daily Labor Report

From: Martin, Andrew
Subject: Legal News FYI 04-02-19
Date: Tuesday, April 2, 2019 8:36:01 AM
Attachments: image001.png

Tuesday, April 2, 2019

Labor Department to Limit Franchiser, Staffing Wage Liability

BloombergLaw - Daily Labor Report 02 Apr 2019 07 06

By Patricio Chile The Labor Department yesterday proposed a new regulation to limit "joint employer" liability for franchisers and businesses that use workers provided by staffing firms. • Proposed Test: The DOL says a proposed four-factor test for...

Unions at Work: San Francisco Bike-Share Workers Unionize

BloombergLaw - Labor Relations News 02 Apr 2019 06:07

By Louis C. LaBrecque Keep up-to-date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news. Bike-Share Workers Unionize Employees who service San Francisco's Ford GoBike system voted to join...

D.C. Circuit Weighs In On NLRB Test For Adjunct Faculty Unionization

Mondaq Business Briefing 02 Apr 2019 04:08

Colleges and universities should take note of the Court of Appeals for the D.C. Circuit's recent decision in University of Southern California v. National Labor Relations Board , Case No. 17-1149 (D.C. Cir. Mar. 12, 2019) addressing whether non-tenure...

NLRB Judge: Requiring Confidential Arbitration is an Unfair Labor Practice

National Law Review 01 Apr 2019 15:01

Article By While the U.S. Supreme Court's recent decisions have generally supported he enforceability of employment-related arbitration agreements, mandatory employment arbitration remains under fire in other contexts. The latest example came on March...

Blog Post: High Court Turns Away 4 Employment Cases

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 01 Apr 2019 13:47

The U.S. Supreme Court turned away four employment appeals Monday, including pe itions challenging a National Labor Rela ions Board ruling letting off-duty workers picket near a hospital entrance and an en banc Ninth Circuit ruling letting a Washington...

Blog Post: NLRB Defends Mexichem Unit's Plant Closure At DC Circ.

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 01 Apr 2019 13:41

The National Labor Relations Board has urged the D.C. Circuit to reject a United Steelworkers' challenge to he board's finding that a Mexichem subsidiary closed a Kentucky plant because of business pressures, not to punish a union representing ...read...

U.S. Labor Department Moves to Ease Companies' Liability for Franchisee Wage Violations

New York Times, The (New York, NY) 01 Apr 2019 12:56

(Reuters) - The U.S. Department of Labor on Monday issued a proposal that would make it more difficult to prove companies are liable for the wage law violations of their contractors or franchisees, a top priority for business groups. If adopted, the rule...

Off-Duty Picketing at Hospital Won't Get High Court Look (1)

BloombergLaw - Daily Labor Report 01 Apr 2019 09:46

• Jus ices won't review case permitting picketing • Win for labor likely temporary By Hassan A. Kanu and Jay-Anne B. Casuga The U.S. Supreme Court won't take up an appeal on whether federal labor law protects off-duty hospital workers who held stationary...

We won't get out of the Second Gilded Age the way we got out of the first

VOX.com 01 Apr 2019 08:48

Andrew Carnegie, steel magnate and one of the 19th century's richest men, made an offhand remark while bragging about his wealth to a newspaper reporter in early 1892: "It isn't the man who does the work that makes the money. It's he man who gets o her...

Mice, bedbugs invade DOL headquarters

POLITICO PRO BY IAN KULLGREN 04/01/2019 04:10 PM EDT UPDATED 04/01/2019 05:54 PM EDT

Levels of mouse allergen — airborne particles of dried rodent urine — are nearly 70 times what would be considered a 'moderate' exposure amount. **(FULL TEXT AVAILABLE ON REQUEST FOR THE STRONG OF STOMACH)**

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Itinerary-NoReply@CWTSatoTravel.com
To: Bashford, Jo Ann; Ring, John; SM-ETravel
Subject: ITINERARY ONLY - JOHN F RING - Travel Date: 21MAY19 - Ref: OSOEZW
Date: Tuesday, April 2, 2019 11:48:05 AM
Attachments: OSOEZW.pdf

Please retrieve your reservation in E2 using the record locator OSOEZW to ensure your travel is approved and ticketed.

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Trip on May 21, 2019

Locator: **OSOEZW** Date: **Apr 02, 2019**

Traveler	**JOHN F RING**
	ATTN-JOHN RING NLRB NATIONAL LABOR RELATIONS BOARD 1015 HALF STREET, SE WASHINGTON DC 20570 US
	THIS IS AN ITINERARY ONLY AND NOT A VALID TICKET OR RECEIPT
Customer Number	511TU9C
Agent	58

AMTRAK CONFIRMATION NUMBER 6C84D8

Tuesday, May 21, 2019

Confirmation **2V6C84D8**

Rail AMTRAK TRAIN 2168

DEPARTURE	ARRIVAL
1:50 PM, May 21, 2019	**4:13 PM, May 21, 2019**
WASHINGTON - UNION STATION	**METROPARK**
50 MASSACHUSETTS AVE. N.E.	**100 MIDDLESEX-ESSEX TPK.**
WASHINGTON	**METROPARK ISELIN**

Status	Confirmed
Notes	LV-1350/DT-21MAY/FR-WASHINGTON/AT-METROPARK ISELIN/NA-TRAIN 2168/AR-1613/CF-2V6C84D8-

Tuesday, May 21, 2019

Confirmation **85897000**

Hotel NEWARK MARRIOTT LIBERTY AIRPRT

LOCATION	CONTACT
1 HOTEL ROAD	**Tel 1-973-6230006**
NEWARK, NJ US 07114	**Fax 1-973-6237618**

Reserved For	JOHN F RING
Status	Confirmed
Check-In	May 21, 2019
Check-Out	May 22, 2019
Number of Rooms	1
Rate	USD 141.00/night
Cancellation Policy	Cancel 3 days prior
Membership No	362048142
Notes	HTL POLICY-CANCEL 72HRS PRIOR ARR

Wednesday, May 22, 2019

Confirmation **2V6C84D8**

Rail AMTRAK TRAIN 2107

DEPARTURE	ARRIVAL
7:28 AM, May 22, 2019	**9:59 AM, May 22, 2019**
METROPARK	**WASHINGTON - UNION STATION**
100 MIDDLESEX-ESSEX TPK.	**50 MASSACHUSETTS AVE. N.E.**
METROPARK ISELIN	**WASHINGTON**

Status	Confirmed
Notes	LV-0728/DT-22MAY/FR-METROPARK ISELIN/AT-WASHINGTON/NA-TRAIN 2107/AR-0959/CF-2V6C84D8-

Form of Payment: (b) (6) [redacted]

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From:	Lambert, Malissa
To:	Aburvasamy, Prem; Amchan, Arthur; Chu, Kenneth W.; Emanuel, William; Etchingham, Gerald M.; Giannasi, Robert (ALJ); Kaplan, Marvin E.; Lucy, Christine B.; McConnell, Isabel; McFerran, Lauren; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Tursell, Beth
Subject:	Judges Division Monthly Statistical Report (March)
Date:	Tuesday, April 2, 2019 2:55:18 PM
Attachments:	Judges Division Monthly Statistical Report(March 2019).pdf

Good afternoon everyone, please find attached the Judges Division Monthly Statistical Report for March.

UNITED STATES GOVERNMENT
National Labor Relations Board
Division of Judges

Memorandum

To: The Board

From: Robert A. Giannasi
Chief Administrative Law Judge

Date: April 2, 2019

Subject: Statistical Summary, March 2019

In March 2019, the Judges Division issued 15 decisions and settled 58 cases. Fourteen hearings closed during the month. The decisions issued this month had a median elapsed time of 108 days from close of hearing and a median elapsed time of 90 days from receipt of briefs or submissions. These decisions involved cases that average 221 transcript pages.

Judges' dispositions (decisions and settlements) for this fiscal year are 333. Dispositions for the same period in Fiscal Year 2018 were 291. Decisions issued this fiscal year were in cases that averaged 367 transcript pages; they issued in a median of 101 days from close of hearing and 62 days from receipt of briefs or submissions.

There were 292 cases awaiting trial on April 1, 2019.

Attachments:

DIVISION OF JUDGES
CUMULATIVE STATISTICAL SUMMARY
Fiscal Year 2019

CASE ACTIVITY									PERFORMANCE			
MONTH	INTAKE	JDS ISSUED	SETTLED BY ALJ	TOTAL DISPOSED	CLOSED	AVERAGE TR. PGS	WASHOUT % (1)	COMPL % (2)	TRIAL BACKLOG	PER ALJ	JD BACKLOG	PER ALJ
OCT	85	11	48	88	17	403.27	87.50	36.36	321	11.89	70	2.59
NOV	72	13	37	71	13	413.31	81.69	53.85	306	11.33	71	2.63
DEC	96	14	33	66	8	421.93	78.79	50.00	320	11.85	66	2.44
JAN	86	16	40	84	15	366.13	80.95	68.75	309	11.44	63	2.33
FEB	79	15	33	77	10	424.29	80.52	53.33	292	10.81	63	2.33
MAR	97	15	58	101	14	220.93	85.15	60.00	292	10.81	63 (3)	2.33
APR												
MAY												
JUN												
JUL												
AUG												
SEP												
CUM	515	84	249	487	77							
AV FY 2019	85.83	14.00	41.50	81.17	12.83	367.00	79.16	54.76	306.67	11.36	66.00	2.44
AV FY 2018	87.00	12.50	36.75	75.75	12.17	530.90	80.24	36.00	354.33	12.62	67.17	2.39

1 Dates given for trial that did not result in JD issuing (dismissed, settled or cancelled).

2 Based on JDs issued that the Board did not have to process (includes automatic adoptions and settlements after exceptions filed).

3 There is one EAJA case pending.

Judges Decisions Issued

Case Number	Case Name	Judge	Date Closed	Date Briefs Received	Action Type	Hearing Days	Transcript Pages	Issued Date	Days: Close of Hearing to Decision	Days: Briefs to Decision
16-CA-218857	Rohm and Haas Texas Incorporated, a subsidiary of The Dow Chemical Company	SANDRON, IRA	12/17/2018	1/28/2019	Decision on Hearing	1	99	3/1/2019	74	32
04-CA-226116	Jennersville Regional Hospital	AMCHAN, ARTHUR	1/14/2019	2/26/2019	Decision on Hearing	1	60	3/4/2019	49	6
16-CA-214170	Littlejohn Electrical Solutions, LLC	RINGLER, ROBERT	8/21/2018	10/5/2018	Decision on Hearing	2	456		195	150
28-CA-213222	Malco Enterprises of Nevada, Inc. d/b/a Budget Rent a Car of Las Vegas	MONTEMAYOR, DICKIE	10/17/2018	12/7/2018	Decision on Hearing	2	243	3/8/2019	142	91
01-CA-198949	Baystate Franklin Medical Center	BOGAS, PAUL	8/23/2018	11/16/2018	Decision on Hearing	4	818	3/11/2019	200	115
01-CA-200126	Prospect Chartercare, LLC	DAWSON, DONNA	7/24/2018	9/21/2018	Decision on Hearing	1	230		230	171
04-CB-216541	IATSE Local 8 (1. Elliott-Lewis Corp., 2. Freeman)	AMCHAN, ARTHUR	1/31/2019	3/7/2019	Decision on Hearing	1	234		39	4
05-CA-221952	Amnesty International USA	ROSAS, MICHAEL	1/25/2019	3/6/2019	Decision on Hearing	1	130	3/18/2019	52	12
12-CA-192417	Spartan Products, LLC	TAFE, ELIZABETH	6/13/2018	8/4/2018	Decision on Hearing	2	207	3/19/2019	279	227
28-CA-166389	GC Services Limited Partnership, a limited partnership, and GC Financial Corp., general partner	LAWS, ELEANOR		2/15/2019	Decision on Stipulated Record	0	0		0	32
02-CA-190704	Twin America, LLC and City Sights NY LLC, a Single Employer, and JAD Transportation, Inc., a Joint E	GARDNER, JEFFREY	6/19/2018	8/6/2018	Decision on Hearing	2	414	3/20/2019	274	226
09-CB-205891	UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UN	OLIVERO, MELISSA	8/1/2018	9/6/2018	Decision on Hearing	1	223		231	195
10-CA-175850	Pfizer, Inc.	LOCKE, KELTNER			Decision on Remand	0	127	3/21/2019	0	0
19-CA-221172	G4S Secure Solutions (USA), Inc.	LAWS, ELEANOR		3/13/2019	Decision on Stipulated Record	0	0	3/25/2019	0	12
25-CA-219925	Alcoa Corporation	BOGAS, PAUL	2/5/2019	3/12/2019	Decision on Hearing	1	73	3/27/2019	50	15

Judges Decisions Issued

	Division Total	DC - Division of Judges	NY - Division of Judges	SF - Division of Judges
Total Hearing Days	**19**	15	2	2
Avg. Hearing Days	**1**	1	2	0
Total Transcript Pages	**3314**	2657	414	243
Avg. Transcript Pages	**220**	241	414	81

Total days: Close of Hearing to Decision	**1815**	1399	274	142
Avg. Days: Close of Hearing to Decision	**121**	127	274	47
Total Days: Briefs to Decision	**1379**	1018	226	135
Avg. Days: Briefs to Decision	**92**	93	226	45
Total Decisions	**15**	11	1	3

Judges Decisions Issued - Median Time Elapsed

Median Days: Close of Hearing to Decision	108
Median Days: Briefs to Decision	90

Hearings Closed

Judge Name	Date Opened	Date Closed	Case Number	Case Name	City	State
AMCHAN, ARTHUR	3/5/2019	3/5/2019	07-CA-201332	Huron Valley- Sinai Hospital	Detroit	MI
AMCHAN, ARTHUR	3/18/2019	3/22/2019	10-CA-208255	Kumho Tires	Warner Robins	GA
ANZALONE, MARA-LOUISE	2/19/2019	3/4/2019	19-CA-215741	Columbia Sussex Corporation d/b/a Hilton Corporation	Anchorage	AK
CHU, KENNETH	3/19/2019	3/19/2019	02-CA-229024	Montefiore Medical Center	New York	NY
ESPOSITO, LAUREN	3/26/2019	3/26/2019	29-CA-213963	Alle Processing Corp. d/b/a Meal Mart	Brooklyn	NY
ETCHINGHAM, GERALD	3/18/2019	3/18/2019	32-CA-226909	THE PERMANENTE MEDICAL GROUP INC. NORTHERN CALIFORNIA REGION	Oakland	CA
ETCHINGHAM, GERALD	3/26/2019	3/26/2019	32-CA-226320	JANUS OF SANTA CRUZ	Oakland	CA
GARDNER, JEFFREY	2/26/2019	3/25/2019	29-CA-222257	Madelaine Chocolate Novelties, Inc.	Brooklyn	NY
GOLLIN, ANDREW	3/18/2019	3/22/2019	14-CA-217400	Noah's Ark Processors, LLC d/b/a WR Reserve	Hastings	NE
MONTEMAYOR, DICKIE	2/26/2019	3/1/2019	28-CA-209109	Service Employees International Union Local 1107	Las Vegas	NV
ROSAS, MICHAEL	3/12/2019	3/12/2019	12-CA-180495	Capitol Transportation Inc.	San Juan	PR
ROSAS, MICHAEL	3/19/2019	3/21/2019	22-CA-218903	Exxon Mobil Research & Engineering	Newark	NJ
SANDRON, IRA	12/4/2018	3/14/2019	12-CA-214830	Hospital Menonita Guayama, Inc.	Miami	FL
Sotolongo, Ariel	3/19/2019	3/19/2019	20-CA-229397	American Medical Response West	San Francisco	CA
Grand Total						**14**

From:	Burdick, Ruth E.
To:	Arbesfeld, Mark; Barham, Jeffrey; Bock, Richard; Carlton, Peter J.; Coleman, Jocelyn; Colwell, John F.; Cowen, William B.; Emanuel, William; Finkelstein, Marci J.; Free, Douglas; Giannasi, Robert (ALJ); Goldstein, Steven; Head, Brittani; Jacob, Fred; Kaplan, Marvin E.; Krafts, Andrew J.; Kraus, Grant; Kyle, John; Lambert, Malissa; Lennie, Rachel G.; Lucy, Christine B.; McFerran, Lauren; ML-HQ-Advice; ML-HQ-Appellate and Supreme Court Litigation Brch; ML-HQ-Contempt, Compliance, and Special Lit Branch; ML-HQ-Solicitor"s Office; Murphy, James R.; Pearce, Mark G.; Platt, Nancy; Qureshi, Farah Z.; Rappaport, Steve; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Sophir, Jayme; Stock, Alice B.; Walkowiak, Robert G; Zick, Lara S.
Cc:	Leach, David E.; Fox, Richard; Schechter, Eric R.
Subject:	Third Circuit decision in County Concrete Corporation, Board Case 22-CA-171328 (reported at 366 NLRB No. 64)
Date:	Tuesday, April 2, 2019 3:58:37 PM
Attachments:	County Concrete Corporation 18 2013 Brief.pdf.pdf

In an unpublished opinion that issued on Thursday, March 28, 2019, the Third Circuit enforced the Board's order issued against this operator of a ready-mix concrete sales and transportation business with multiple facilities in New Jersey, where the International Brotherhood of Teamsters Local 863 is the bargaining representative of 146 drivers, mechanics, laborers, and heavy equipment operators. In doing so, the court upheld the findings of the Board (Members Pearce, Kaplan, and Emanuel) that the employer violated Section 8(a)(5) and (1) of the Act by modifying the effective date of the dues-checkoff clauses contained in its five collective-bargaining agreements with the union, and by failing and refusing to collect authorized dues and remit them to the union in January and February 2016.

In 2009, the employer voluntarily recognized the union. The parties began contract negotiations and agreed, among other things, that they would have five separate agreements to reflect the differences in work performed at the facilities. In Fall 2015, after six years of extensive negotiations, the employer provided the union with a set of final proposals, which the union membership ratified. Thereafter, the parties agreed that the five agreements would be effective November 8, 2015, with dues checkoff beginning January 1, 2016. The employer's counsel then drafted the agreements, all five of which stated that they were effective November 8, 2015, with checkoff clauses effective January 1, 2016. In a number of communications over the next two months, the parties referenced those same effective dates. In mid-January, the union executed the agreements and returned them to the employer and, a few days later, provided over 100 signed dues authorization cards with more to follow. By mid-February 2016, despite giving the union assurances, the employer had not remitted any dues, nor had it provided signed copies of the agreements. Then, on March 4, the employer mailed the union the executed agreements which, in each of the dues-checkoff clauses, the effective date of "January 1, 2016," had been crossed out by hand, and replaced with "March 1, 2016."

On review, and without hearing oral argument, the court upheld the Board's unfair-labor-practice findings because they were supported by substantial evidence and consistent with precedent. Specifically, the court agreed with the Board that the parties had a meeting of the minds that January 1, 2016, was the effective date for dues-checkoff, and given that there was no dispute that the employer had modified that date without the union's

consent, or that the employer had failed to collect and remit dues consistent with that agreement, its actions were unlawful. In rejecting the employer's contentions, the court held that "the lack of a signature was not fatal" to the parties' agreed-upon date, that the agreements' union-security clauses had no bearing on dues checkoff, that there was no evidence of union coercion in the collection of check-off authorizations, and that the union's failure to provide employees with notices of their financial-core rights did not excuse the employer's failure to deduct and remit dues. In comments, the court "caution[ed] employers against seeking to vindicate their employees' [rights to financial-core notices] unilaterally," given that "[t]he beneficiary of these notices is the employee, not the employer." Having found that the employer presented no viable basis for the court to excuse its unfair-labor-practice liability, the court enforced the Board's order in full.

The court's unpublished opinion is here, and the Board's brief to the court is attached.

Nos. 18-2013, 18-2105

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTY CONCRETE CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Intervenor

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Labor Management Relations Act
(29 U.S.C. § 186)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2013, 18-2105

COUNTY CONCRETE CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of County Concrete Corporation ("the Company") to review an order issued by the National Labor Relations Board

("the Board") against the Company, and the Board's cross-application to enforce that order. The Board's Decision and Order issued on April 20, 2018, and is reported at 366 NLRB No. 64. (A. 21-31.)[1] The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act, 29 U.S.C. 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board's Order is final with respect to all parties. The Court has jurisdiction over this appeal under Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f). Venue is proper because the Company transacts business in this Circuit. The petition and application were both timely because the Act imposes no time limits for such filings. The charging party before the Board, Local 863, International Brotherhood of Teamsters ("the Union"), has intervened on the Board's behalf.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the effective date of the dues-checkoff provisions contained in agreed-upon collective-bargaining agreements with the Union, and by failing to collect and remit authorized dues to the Union in January and February 2016.

[1] "A" references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF RELATED CASES

This case has not been before this Court previously, and the Board is unaware of any related case as defined in L.A.R. 28.1(a)(2).

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally modifying the effective date for the check-off of union dues from the wages of employees who have authorized such deductions, as required under collective-bargaining agreements entered into by the Company and the Union, and by failing and refusing to remit those dues payments to the Union. (A. 23; 301-07, 311.) After a hearing, an administrative law judge issued a decision and recommended order finding that the Company committed those violations. (A. 23-31.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order, with modifications. (A. 21-31.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; in November 2015, the Union and the Company Agree to All Terms of Collective-Bargaining Agreements that Require the Company To Begin Collecting and Remitting Union Dues on January 1, 2016

County Concrete, a ready-mix concrete sales and transportation company, operates multiple facilities in New Jersey. (A. 23; 142-43, 237, 294, 301-04.) On May 12, 2009, the Company voluntarily recognized the Union as the exclusive collective-bargaining representative for its drivers, mechanics, laborers, and heavy equipment operators employed at its facilities, which currently includes 146 employees. (A. 23; 134-36, 142-43, 237-39, 294, 301-04, 317-20, 768.)

In June 2009, the parties began negotiations for an initial collective-bargaining agreement. The parties agreed that they would use, as a template, a prior bargaining agreement between the Company and the International Brotherhood of Teamsters Local 408, which had previously represented the Company's employees. Bargaining focused on economic issues and the parties eventually agreed that they would have five separate agreements to reflect differences in work performed at the different company facilities, but that most of the provisions set forth in the template would remain the same for each agreement. (A. 23; 137-48, 207-08, 242, 321-508.) The template, incorporated into bargaining proposals, had a dues-checkoff provision that provided, in relevant part, that "during the life of this agreement the employer agrees to deduct once each month

from the employees' wages and remit to the [u]nion monthly dues." (A. 23; 138-41, 324, 340, 357, 371, 389, 408, 427, 446, 465, 483.)

In May 2015, after nearly six years of extensive negotiations, the Company sent the Union a "final offer" that listed a variety of proposed changes to the template, none of which modified the template's dues-checkoff provision. (A. 23-24; 149, 510-15.) On November 8, the union membership ratified the Company's final offer. (A. 24; 141, 149-51, 239-41, 516.)

After the ratification vote, Union Secretary-Treasurer Alphonse Rispoli called company counsel Desmond Massey to inform him of the Union's ratification. During the conversation they agreed that the five bargaining agreements would be effective November 8 and that Massey would draft them. (A. 24; 151-54, 239-40.) Rispoli also spoke with Company President John Crimi, who confirmed that the parties would use November 8 as the effective date for the agreements and that Massey would draft them. Rispoli agreed with Crimi's proposal to start dues deductions on January 1, 2016. Crimi also stated that the Company would distribute authorization cards provided by the Union which employees could sign to permit union dues payments to be deducted from their wages. (A. 24; 154-56, 236, 517-19.)

In a letter to the Company dated December 1, Rispoli confirmed that dues deductions would begin on January 1, 2016. (A. 156-57, 251, 517.)

B. In December 2015, the Company Provides the Union with Draft Copies of the Bargaining Agreements Under Which the Collection and Remittance of Union Dues Begins on January 1, 2016; the Union Signs and Returns the Agreements

On December 22, Kurt Peters, the Company's in-house counsel, sent Rispoli two "execution copies of each of the [five] collective-bargaining agreements." (A. 24; 165-68, 531-606.) The five agreements were consistent with the terms the parties agreed to in November. Specifically, all of the agreements stated that they were effective November 8, 2015. (A. 24; 165-68, 532, 534, 547, 549, 562, 577, 579, 592, 594). And Article 3 of each agreement, entitled "Dues Check-Off," stated:

> [T]his Article 3 is effective January 1, 2016. Thereafter and during the remainder of the life of this Agreement . . . the [Company] agrees to deduct once each month from the employees' wages and remit to the . . . Union monthly dues . . . levied by the . . . Union.

(A. 24; 165-68, 535, 550, 565, 580, 595.) In an accompanying letter, Peters confirmed that the Company "added the effective date of November 8, 2015 (which you have told us is the date the members ratified the [agreements]) and set January 1, 2016 as the start date for dues." (A. 24; 531.) In the letter, Peters also asked Rispoli to "execute both copies [of each agreement] and return them to me so I can have [President] Crimi sign them when he returns from his vacation." (A. 24; 531.) Rispoli signed the agreements sent to him by the Company and returned them by express mail to Peters on January 13, 2016. (A. 24; 168-71, 607-705.)

C. In January 2016, the Union Submits Signed Dues Authorization Forms to the Company that It Began Collecting in December 2015

Although the Company initially informed the Union in November 2015 that it would distribute dues-checkoff authorization forms to employees, in December, it informed the Union that it would not distribute the forms. Thereafter, the Union requested a seniority list from the Company that it could use to distribute the forms. (A. 24; 153, 155-59, 520.) After receiving the seniority list, the Union sent two of its business agents to the Company's various facilities to distribute dues-checkoff authorization forms to the union's stewards at each facility. The Union had difficulties obtaining signed authorization forms from some employees because the seniority list, and a subsequent revised list, contained inaccuracies. Nevertheless, during December, the Union collected approximately 100 signed authorizations from employees. (A. 24; 160-65, 171-72, 180, 267-68, 521-30.)

The form distributed by the Union contained two sections. One section, entitled, "Application for Membership," states, "I hereby make application for admission to membership so that the . . . Union may represent me for the purpose of collective bargaining," and "authorize my employer to deduct my dues from my wages and pay them to [the Union]." (A. 25, 518, 707-33.) A second section, entitled "Checkoff Authorization and Assignment," provided authorization for the Company to deduct from the employee's "wages each and every month an amount equal to the monthly dues, initiation fees, and uniform assessments of [the Union],

and direct such amounts so deducted to be turned over each month to the [Union]." (A. 25; 518, 707-33.) That section further stated that the "authorization is voluntary and is not conditioned on my present or future membership in the Union." (A. 25, 518, 707-33.)

D. The Company Fails To Deduct or Remit Union Dues in January and February 2016

In January, Rispoli informed Attorney Peters and Vice-President John Scully that the applicable formula for union dues was 2.5 percent of the employee's hourly rate plus $1. They informed Rispoli that the Company wanted to straighten out the seniority list before submitting dues. (A. 26; 172-74.) During a subsequent phone call, President Crimi asked Rispoli to waive the January dues absent the Union having provided a full accounting of dues forms. Rispoli declined. (A. 26; 187-88, 219-21, 273.)

On January 20, the Union emailed copies of 102 signed dues authorization cards to the Company. (A. 21 n.1, 26; 175, 707-33.) The Union continued to collect authorization forms throughout January, and by letter dated February 3, the Company confirmed receipt of dues-checkoff authorizations for 125 employees. (A. 26; 181-82, 768-71.) On February 6, the Union responded with a complete dues-accounting sheet, listing each union member for whom they had an authorization card, with their wage rate, and the dues owed. The Union requested remittance of the dues by February 15. (A. 26; 177-78, 214-18, 231-32, 736-67.)

By mid-February 2016, the Company had not remitted any dues payments to the Union, nor had it provided the Union with signed copies of the collective-bargaining agreements. Rispoli called Attorney Peters and asked when the Union would receive the dues payments and the signed agreements. Peters replied that he was "working on" the agreements. (A. 26; 182-83.)

E. In March 2016, the Union Receives Signed Agreements in Which the Company Unilaterally Changed the Agreed-Upon Date to Start Dues Collection from January to March 2016; in April 2016, the Company Remits March and April Dues

In a February 26 letter, Attorney Peters informed Rispoli that "the date dues will be initially collected . . . must be changed in all of the [agreements] to March 1, 2016." (A. 27; 798-99.) After receiving the letter, Rispoli called Peters. Peters reiterated that the Company would change the effective date for dues deduction from January 1 to March 1. Rispoli replied that their agreement back in November, was for dues to be deduced and remitted as of January 1, and stated that the Union would not agree to any change in the date. (A. 27; 187-88.) Rispoli then called President Crimi, who expressed surprise that the Union had not yet received the agreements because he had signed them. (A. 27; 189.)

In a letter dated March 4 from Vice-President Scully to Rispoli, the Company enclosed collective-bargaining agreements signed by President Crimi. (A. 27; 801-901.) In Article 3 of each agreement, entitled "Dues Check-Off," Crimi crossed out "January 1, 2016," as the effective date for the clause to take

effect, and hand wrote in the words "effective March 1, 2016." (A. 27; 805, 825, 845, 865, 885.) In the accompanying cover letter Scully wrote, "[a] small change has been made. . . . [President] Crimi has changed the dues check off date from January 1, 2016 to March 1, 2016 to reflect the date of the initial execution of the [agreements] by both parties." (A. 27; 229, 801.) In the letter, Scully also asked the Union to initial the changes in its set of the agreements and forward an updated copy." (A. 27; 801.) Rispoli returned the agreements to the Company with the word "January" written back in as the effective month for Article 3. (A. 27; 195-96, 922-1002.)

On March 9, the Union emailed the Company its dues-accounting sheet outlining dues payments owed for March.[2] On April 12, the Company remitted March dues to the Union. On April 19, the Company remitted April dues payments. (A. 27; 196-97, 224-28, 231-36, 1003-06.)

[2] The accounting sheet contained separate ledgers for those employees who selected financial-core status and those employees who selected full-membership status. As explained below (p. 27 n.5), an employee who selects financial-core membership does not pay full union dues. Rather, the employee pays dues that reflect only a union's costs germane to representing the unit employees. Here, about 35 employees selected financial-core status, and thus paid anywhere between $37 and $42 per month in dues, whereas full members paid between $46 and $52 per month. (A. 27; 277-88.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On April 20, 2018, the Board (Members Pearce, Kaplan, and Emanuel) issued its Decision and Order finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by modifying the effective date of the dues-checkoff authorization provisions in the collective-bargaining agreements. (A. 21-23.) The Board further found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) by failing and refusing to collect authorized dues from January 1 through March 1, 2016, and remit them to the Union. (A. 21-23.)

The Board's Order requires the Center to cease and desist from the unfair labor practices found, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (A. 22.) Affirmatively, the Board's Order directs the Company to reimburse the Union for losses resulting from the Company's failure to deduct and remit union dues in January and February 2016. (A. 22.) The Order also requires the Company to post a remedial notice. (A. 22.)

STANDARD OF REVIEW

The scope of the Court's inquiry in reviewing a Board order is quite limited. The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 606 (3d Cir. 2016). The Board's factual findings, and the reasonable inferences drawn from those findings, are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. *Universal Camera*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Further, the Court "defers to the Board's credibility determinations and will reverse them only if they are incredible or patently unreasonable." *Advanced Disposal*, 820 F.3d at 606 (citations and internal quotation marks omitted). Finally, the Board's legal conclusions must be upheld if based on a "reasonably defensible" construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by modifying the effective date of the dues-checkoff provisions in the collective-bargaining agreements with the Union, and by failing and refusing to deduct and remit authorized dues in January and February 2016. The undisputed record evidence establishes that the Union ratified the Company's final collective-bargaining proposal on November 8, 2015, which the parties thereafter agreed was the effective date of their agreements and that deductions for dues for employees who authorized checkoffs would begin January 1, 2016. Consistent with the Union's ratification and the parties' agreement regarding the start date for dues-checkoff, the Company drafted the five bargaining agreements that set forth January 1, 2016, as the effective date for it to begin remitting dues. Despite timely receiving 125 dues authorization forms by the end of January, the Company failed to deduct and remit any dues to the Union in January and February 2016. Instead, the Company unilaterally modified the five agreements to begin collecting dues on March 1, 2016. In these circumstances the Board was fully warranted in finding that the Company unlawfully evaded its contractual obligations by failing to remit dues in January and February, and further acted unlawfully by modifying the agreements to begin dues collection in

March, thereby overriding the parties' agreed-upon terms without the Union's consent.

The Board reasonably found no merit to the Company's affirmative defenses and rejected them. Thus, contrary to the Company's contention, it was obligated by the agreed-upon terms of the collective-bargaining agreements to remit dues on January 1, 2016, even though the parties' process of executing the agreements had not yet been completed. Further, the Board reasonably rejected the Company's reliance on cases involving union-security clauses, which simply have no application here. And in fairness, the Company is in no position to rely on its own dilatory tactics in signing the very agreements that it prepared and which contained the effective date for dues check-off to which the parties had agreed back in November. Likewise, the Board did not err by requiring the Company to remit dues prior to the Union fully informing the employees of their rights regarding union membership and dues. As the Board found, whether the employees timely received such information may affect the amount of dues that they owe, which can be adjusted, but does not relieve the Company of its contractual obligations to adhere to the agreed-upon terms of its collective-bargaining agreements.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY MODIFYING THE EFFECTIVE DATE OF THE DUES-CHECKOFF PROVISIONS, AND BY FAILING AND REFUSING TO COLLECT AND REMIT AUTHORIZED DUES IN JANUARY AND FEBRUARY 2016

A. Where Parties Have Agreed on a Term and Condition of Employment Through Collective Bargaining, the Employer Cannot Alter the Term Without the Union's Consent

Section 8(d) of the Act, 29 U.S.C. § 158(d), provides that an employer has a statutory obligation to bargain in good faith with the representative of its employees over mandatory terms and conditions of their employment, and a dues-checkoff arrangement is subject to the good-faith bargaining requirement. *Tribune Publishing*, 351 NLRB 196, 197 (2007), *enforced*, 564 F.3d 1330 (D.C. Cir. 2009). Accordingly, in turn, an employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing or refusing to fulfill that statutory bargaining obligation.[3]

Further, under that statutory scheme, parties have a duty to honor their collectively bargained agreements. As Section 8(d) of the Act provides, no party to such an agreement is required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period." 29 U.S.C. §

[3] A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001).

158(d); *see also Chesapeake Plywood, Inc.*, 294 NLRB 201, 212 (1989) ("A party is not required to rebargain that which has already been secured to him by binding past agreement"), *enforced in relevant part*, 917 F.2d 22 (4th Cir. 1990). Accordingly, it is an unfair labor practice in violation of Section 8(a)(5) for a party to modify the terms of a collective-bargaining agreement unilaterally. *NLRB v. Ford Bros., Inc.*, 786 F.2d 232, 233 (6th Cir. 1986); *Chesapeake Plywood*, 294 NLRB at 201, 211-12; *Safelite Glass*, 283 NLRB 929, 939 (1987). The prohibition on non-consensual midterm modifications reflects Congress' intent to "stabilize collective-bargaining agreements." *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186 (1971); *see also NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 307 (7th Cir. 1981) ("Industrial stability depends, in part, upon the binding nature of collective bargaining agreements.").

The Board has defined "modification" for Section 8(d) purposes to include "a change that has a continuing effect on a basic contractual term or condition." *St. Vincent Hosp.*, 320 NLRB 42, 44 (1995); *see also C & S Indus., Inc.*, 158 NLRB 454, 458 (1966) (same). Such modifications include both express changes to contractual terms, *St. Vincent Hosp.*, 320 NLRB at 42, and failures to implement such terms so as to "effectively terminat[e]" them, *Link Corp.*, 288 NLRB No. 132, 1988 WL 213934, at *2 (1988), *enforced mem.*, 869 F.2d 1492 (6th Cir. 1989).

Even a temporary suspension of contractual employment terms can constitute a midterm modification. *E.G. & G. Rocky Flats, Inc.*, 314 NLRB 489, 497 (1994).

To determine if parties have reached an agreement, the Board looks to whether their actions and communications reflect an intent to be bound. *United Bhd. of Carpenters & Joiners, Local 405*, 328 NLRB 788, 793 (1999). Acting to implement agreed-upon terms is evidence of such intent. *Id.* The Board's standard is an objective one, based on what a reasonable party would understand under the circumstances; the parties' unexpressed, subjective intentions are not relevant. *TTS Terminals, Inc.*, 351 NLRB 1098, 1101 (2007).

In conducting that analysis, "the Board is not bound by technical questions of traditional contract interpretation." *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349, 1355 (9th Cir. 1981); *accord Wyandanch Engine Rebuilders, Inc.*, 328 NLRB 866, 875-76 (1999). The relationship between an employer and a union is governed by the Act and its underlying principles of encouraging agreement and promoting stable, ongoing industrial relations. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981); *Lozano Enters. v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1964). Unlike parties negotiating an arms-length commercial contract, an employer and a union have a statutory duty to bargain throughout the course of their relationship—and to do so in good faith and exclusively with each other.

Presto Casting Co. v. NLRB, 708 F.2d 495, 497-98 (9th Cir. 1983); *Pepsi-Cola Bottling*, 659 F.2d at 89.

The parties' ongoing statutory obligation, rather than the formalities of the common law of contracts, is what guides the process of negotiation and agreement in this context. As a result, "[t]he Board is free to use general contract principles adapted to the collective bargaining context to determine whether the two sides have reached an agreement." *World Evangelism, Inc.*, 656 F.2d at 1355; *see also Presto Casting*, 708 F.2d at 497-98 (explaining that the "policies of the Act dictate that this process not be encumbered by undue formalities"). Thus, for purposes of the Board's Section 8(a)(5) analysis, the "crucial inquiry is whether the two sides have reached an 'agreement,' even though that 'agreement' might fall short of the technical requirements of an accepted contract." *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976). Accordingly, when the parties have been found to have agreed to the substantial terms and conditions of a contract, they can be held to the terms of that agreement even though it may not been reduced to writing. *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 524-26 (1941); *NLRB v. New-York-Keansburg-Long Branch Bus Co., Inc.*, 578 F.2d 472, 476-77 (3d Cir. 1978).

B. The Board Reasonably Found that the Company Modified Its Agreements with the Union Regarding Dues Checkoff Without the Union's Consent

Ample undisputed evidence supports the Board's finding that "the [Company] and the Union reached an agreement in November 2015 that deductions of dues for employees who authorized checkoffs would begin January 1, 2016." (A. 21 n.1.) Thus, the record establishes that during lengthy negotiations, the parties never altered language used in a template from a prior bargaining agreement between a different union and the Company that required the Company to remit union dues. Thereafter, on November 8, 2015, the union membership ratified the Company's final offer that made certain modifications to the template, but no modification to the Company's requirement to deduct and remit union dues.

Critically, the Company does not dispute the Board's finding that after the Union's ratification, it then orally agreed to draft each of the five specific bargaining agreements "with an effective date of November 8, 2015 and a date for dues deductions and remittances to commence on January 1, 2016." (A. 29.) Indeed, both Company Counsel Massey and Company President Crimi confirmed in conversations with Union Secretary-Treasurer Rispoli that the agreements would be effective November 8, 2015, the date of the Union's ratification of the Company's final offer. In addition, Crimi further confirmed with Rispoli that dues

collection would begin January 1, 2016. In sum, as the Board found, "the parties reached a meeting of the minds on all substantive issues and material terms in November 2015," including the Company's obligation to begin collecting and remitting union dues on January 1, 2016. (A. 21 n.1.)

Moreover, the Company demonstrated an intent to be bound by the January effective date to begin collecting and remitting union dues. Thus, in December, consistent with the parties' oral agreement, company in-house counsel Peters provided the Union with copies of five bargaining agreements that were effective November 8, 2015, and that, by their terms, required the Company to begin remitting dues payments on January 1, 2016. In an accompanying cover letter, Peters specifically highlighted the effective dates of November 8, 2015, for the agreements, and January 1, 2016, for the checkoff of union dues.

The undisputed facts further establish that the Company did not collect and remit dues in January or February. Thus, the Company does not dispute, as the Board found, that "[b]y the end of January, the [Company] had received 125 signed dues-checkoff authorizations." (A. 21 n.1.) Nor is there any dispute, as the Board further found, that "upon receipt of these authorizations . . . [the Company] refused to deduct dues for any employee for the months of January and February." (A. 21 n.1.) Rather than beginning to collect and remit union dues in January, the Company instead unilaterally modified the agreements to begin dues collection and

remittance in March, and refused to collect and remit dues to the Union in January and February.

In these circumstances, the Board was fully warranted in finding that the Company "violated Sec[tion] 8(a)(5) and (1) of the Act by modifying the dues-checkoff provisions of its collective-bargaining agreements with the Union and by refusing to deduct and remit dues to the Union in January and February 2016 in accordance with those agreements." (A. 21 n.1.) *See Shen-Mar Food Prods., Inc.*, 221 NLRB 1329, 1329 (1976) (finding that, where an employer fails to deduct and remit dues in derogation of an existing contract, it is in effect "unilaterally changing the terms and conditions of employment . . . and thus violates Section 8(a)(5) of the Act"), *enforced in relevant part*, 557 F.2d 396 (4th Cir. 1977); *Hearst Corp. Capital Newspaper*, 343 NLRB 689, 693 (2004) ("An employer violates Section 8(a)(5) by ceasing to deduct and remit dues in derogation of an existing contract").

C. The Company's Contentions Are Without Merit

1. The Board did not err by requiring the Company to remit dues prior to when it signed the collective-bargaining agreements

The Company incorrectly contends (Br. 18-25) that the Board acted contrary to Board precedent by requiring it to collect and remit dues after it received dues-authorization forms from unit employees, but prior to it signing the collective-

bargaining agreements in late February 2016. As the Board noted, the Company supports its argument by relying "on cases pertaining to union-security clauses" (A. 21 n.1), which are clauses in collective-bargaining agreements that require union membership, and are legally distinct from questions of dues checkoff. In that context, the Board has held that "a union-security clause may not be applied retroactively," and that "the date of execution, not the effective date of a collective-bargaining agreement, governs the validity of such a clause." *Local 32B-32J, SEIU*, 266 NLRB 137, 138 (1983); *see also*, *Peoria Newspaper Guild, Local 86*, 248 NLRB 88, 91 (1980) ("[T]he Act does not sanction the retroactive application of a union-security clause and . . . the date of a contract's execution, . . . not its retroactive 'effective' date, must govern the validity of such a clause.")

Here, in contrast, as the Board explained "this case involves employees' voluntary decision to authorize dues checkoff, not the enforcement of a mandatory union-security provision." (A. 21 n.1.) In the context of the deduction and remittance of union dues, Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, which generally prohibits payments from employers to a union, includes an express exception for the payment of union membership dues. Specifically, Section 302(c)(4) permits an employer to deduct union membership dues from employees' wages and remit those moneys to their exclusive collective-bargaining representative. 29 U.S.C. § 186(c)(4). Accordingly, employees and

their employer can enter into individual written agreements (dues-checkoff authorizations), which instruct the employer, for a period, to deduct union dues from employees' wages and remit those dues to the union that represents them. *See IBEW, Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322, 325, 328-39 (1991).

The Board has long held, as it noted here, "that an employee's decision to authorize the deduction of moneys to be remitted to a union is separate and distinct from the issue of union membership." (A. 21 n.1.) Indeed, as the Board has explained, dues checkoff "does not, in and of itself, impose union membership or support as a condition required for continued employment." *Shen-Mar Food Prods.*, 221 NLRB at 1330; *see also IBEW Local 2088*, 302 NLRB at 328 ("recogniz[ing] that paying dues and remaining a union member can be two distinct actions.") As shown above, the Company and the Union reached an agreement in November 2015 for the Company to begin deducting and remitting union dues on January 1, 2016, from the wages of those employees who subsequently authorized such deductions. Thereafter, the Company failed to comply with that effective date, despite having received 125 dues authorizations forms executed by employees.

Moreover, even putting aside that union membership and authorizing dues checkoff are two distinct matters that can operate independently from each other,

the cases relied on by the Company would not require a different result. In *Local 32B-J, SEIU*, 266 NLRB 137 (1983) (cited at Br. 18-20, 24), the employer and the union negotiated an agreement that was "finalized in a letter of acceptance on March 27, 1981," and made retroactive to July 1, 1980. *Id*. at 138. During the months of March and April, most of the employees in the bargaining unit signed dual purpose cards for the union, under which they agreed to become union members and authorized dues payments. The employer maintained that pursuant to an agreement with the union, dues deductions were to commence on March 1, 1981; however, the union alleged that dues were to commence retroactively to July 1, 1980. *Id*. at 138. In finding that the union committed an unfair labor practice, the Board noted that while "an employee may voluntarily pay dues for a period prior to the execution of a collective-bargaining agreement, that freedom of choice has not been afforded to the employees in the instant case" because the employees were not given "the choice to refrain or not from paying retroactive dues." *Id*. at 139. The Board further explained, "[i]nasmuch as any dues obligation under the union-security clause herein could only have started to accrue from the date of the contract's execution March 27, 1981, and not the date to which the contract was made retroactive July 1, 1980," no obligation to pay or remit dues existed prior to March of 1981. *Id*.

Thus, on the facts of that case, the employer could not collect and remit union dues prior to the parties executing the contract through a "letter of acceptance" absent the employees providing such permission. Here, the Union's ratification of the Company's final offer and it thereafter informing the Company of the ratification is akin to the "letter of acceptance" in *Local 32 B-J* that made the bargaining agreement effective. Moreover, the Board is not ordering the Company to retroactively collect dues. Rather, the Board's order simply requires the Company to collect dues starting in January 2016, an action that is fully consistent with the agreement the parties reached in November 2015 to start the collection and remittance of authorized dues on January 1, 2016.

The Company's reliance on *Peoria Newspaper Guild, Local 86*, 248 NLRB 88 (1980) (cited at Br. 18, 24), is equally misplaced. In that case, the Board found that the union unlawfully sought the discharge of an employee who had resigned his membership in the union at a time when a contract binding him to continued membership was not in force. Specifically, the employee resigned from union membership prior to both the union's ratification of a contract and prior to the parties' execution of the contract. The Board examined the language of the union-security clause in question and found that it did not support the union's contention that the contract's retroactive date, rather than the date it became "an effective contract binding on [the employer]," was controlling. *Id*. at 91. The Board further

found that the contract became binding either upon "its execution by the parties . . . or arguably [earlier] . . . when it was ratified by the [union's] membership." *Id*.

Thus, fully consistent with this case, the Board in *Peoria Newspaper* recognized that a bargaining agreement could be effective based on a union's ratification. Moreover, as the Board explained here, "there is no evidence to support the conclusion that [the Company] could properly rely upon the contract's execution date (which was in its exclusive control), rather than its agreed-to effective date to give the clause effect." (A. 30.) To the contrary, the language at issue in the union-security clause of each agreement here refers to membership during the "terms of this Agreement" (A. 610, 629, 649, 669, 689), and it is apparent that the parties had a meeting of the minds in November regarding all terms and conditions of employment, including the effective date for dues checkoff on January 1, 2016.

In sum, the Company's attempt to avoid its contractual obligations, based on terms and conditions proposed by the Company, ratified by the Union, and set forth in the very agreements that it drafted and forwarded to the Union, rings hollow. Indeed, the Company, as it acknowledges (Br. 23-24), would have acted unlawfully had it simply declined to sign the agreements and failed to implement its terms. Here, it was equally unlawful for the Company to sign the agreements

previously agreed to, but only after unilaterally changing the agreed-upon start date for deducing and remitting union dues.[4]

2. The Board did not err by requiring the Company to remit dues prior to the Union fully informing employees of their rights regarding union membership and dues

The Company next contends (Br. 25-29) that the Board erred by requiring it to collect and remit dues prior to the Union fully informing employees of their rights regarding membership and the payment of union dues. The Board reasonably rejected the Company's contention. In doing so, the Board noted that the Union did not timely provide notices known as "*General Motors*" and "*Beck*" notices when it distributed the dues authorizations forms to the unit employees. (A. 21 n.1.) Such notices provide unit employees with notice of their rights to be a nonmember or to become a financial-core member, who only pays dues for a union's collective-bargaining responsibilities.[5] The Board reasonably found,

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[4] The complaint did not allege that the Company's delay in signing the agreements constituted a separate unfair labor practice. The Board did, however, reject the Company's attempt to justify its unilateral change by relying on its own "dilatory tactics" in signing the very agreements that it drafted. (A. 30.)

[5] A union is required to inform employees, when it first seeks to obligate them to pay dues and fees under a union-security clause, of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to be and remain nonmembers of the union. At the same time, it must inform them of their corresponding rights, as nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities that are not germane to the union's duties as collective-bargaining representative, and to obtain a reduction-in-dues for such

however, that the Union's conduct did not excuse the Company's failure to collect and remit union dues. (A. 21 n.1.) As the Board explained, "[a]lthough the Union's failure to provide employees with a *General Motors* and *Beck* notice may affect the amounts it was entitled to receive . . . it does not justify the [Company's] failure to comply with the agreed-upon contract term to deduct dues." (A. 21 n.1.) Yet here, as the Board found, "[t]he [Company] made no attempt to honor its contractual obligation." (A. 21 n.1.)

The Board's finding is not undermined by the Company's professed concern (Br. 28) that it risked violating the Act if it collected dues prior to the unit employees receiving *General Motors* and *Beck* notices. The Company has not cited any case where an employer was found to have acted unlawfully by collecting dues where a union has not properly provided those notices to the unit employees. To the contrary, even where a union does not timely provide *General Motors* and *Beck* notices, the Board has held that a union is still entitled to collect

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activities—that is, to become financial-core rather than full members of the union. Such members cannot attend union meetings, hold union office, or vote in union elections. *See generally California Saw & Knife Works*, 320 NLRB 224, 231, 233-35 (1995), *enforced sub nom. Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998); *see also Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008).

dues for expenses related to representational activities. *District Councils Nos. 8, 16, and 33 of the Int'l Brotherhood of Painters*, 327 NLRB 1010, 1021-22 (1999).

Moreover, the Company does not dispute, as the Board explained, that "even assuming the [Company] was genuinely concerned about deducting dues in these circumstances or was uncertain as to the correct amounts to deduct, it could have addressed such concerns while making a good-faith effort to honor its contractual obligation." (A. 21 n.1.) For example, as the Board noted, the Company "could have sought the Union's consent to change the start date for dues checkoff, bargained for indemnification from the Union, or placed the dues in escrow pending resolution of its concerns." (A. 21 n.1.) *See generally*, *Nathan's Famous of Yonkers, Inc*., 186 NLRB 131, 133 (1970) (no violation, where an employer's good-faith uncertainty as to which of two unions it was required to remit checked-off dues was demonstrated by placing the dues in escrow). Here, however, the Company, as shown above, simply made no attempt to honor its contractual obligations.

In sum, as the Board explained, the Company's "unlawful unilateral change is not condoned by the fact that certain employees may not have submitted properly executed dues check off forms by the date the relevant contract term was to have taken effect." (A. 30.) Rather, "to the extent questions exist about whether certain employees selected financial-core as opposed to full membership, or about

the particular date that certain employees authorized dues checkoff, these questions can be answered in the compliance stage of th[e] proceeding." (A. 21 n.1.) *See Williams Pipeline Co.*, 315 NLRB 630, 632 and n.8 (1994) (the Board found that the employer violated Section 8(a)(5) of the Act by failing to deduct and remit union dues for those employees who had signed checkoff authorizations, and ordered the Company to remit the dues for employees who signed checkoff authorizations as of that date, while leaving to compliance whether any employees had not signed valid authorization forms).

3. The Board did not err by finding insufficient evidence to invalidate the checkoff authorization cards that the Company received

Finally, the Company (Br. 29-33) attempts to defend its actions by asserting that the Union improperly coerced employees in obtaining union membership and dues authorization cards. The Board reasonably found "[t]he evidence regarding this [claim] unavailing." (A. 29.) Thus, the record establishes that union stewards at each company facility were responsible for obtaining signed authorizations from employees. One employee, Dean Walgren, testified that union steward Vinnie Montefiore, told him that he had to fill out the forms and "[t]hat core members weren't really member[s]." (A. 29; 263.) Putting aside that core members do indeed have more limited rights than full union members (see above p. 27 n.5), the credited record evidence does not establish that any other unit employee, among

the 146 unit employees, received the same information prior to signing an authorization card. In these circumstances, the Board was fully warranted in finding Walgren's testimony "cannot . . . be sufficient evidence of employee coercion to invalidate the well over 100 dues authorization cards obtained by the union in January 2016." (A. 29.)

Moreover, to the extent the Company suggests (Br. 29-33) that it was simply looking out for its employees' rights, that claim is not persuasive. As the Supreme Court long ago explained, "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). Thus, the Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.").

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

November 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTY CONCRETE CORPORATION	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 18-2013, 18-2105
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	)	
	)	
Intervenor	)	

CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel David Seid certifies that he is a member in good standing of the State Bar of Maryland. He is not required to be a member of this Court's bar, as he is representing the federal government in this case.

s/David Seid
David Seid
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2941

Dated at Washington, DC
this 20th day of November 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTY CONCRETE CORPORATION	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 18-2013, 18-2105
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,113 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/Linda Dreeben

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Dated at Washington, DC
this 20th day of November 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTY CONCRETE CORPORATION	)	
	)	
Petitioner/Cross-Respondent	)	
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v.	)	Nos. 18-2013, 18-2105
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	)	
	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 20th day of November 2018

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Tuesday, April 2, 2019 4:34:40 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Halliburton Worker Must Arbitrate Age and Disability Claims

By Patrick Dorrian

A Halliburton employee who says he was fired because of his age and his disability must arbitrate his claims, a federal judge ruled.

Roosevelt Hotel Server Gets Harassment Trial Against Interstate

By Patrick Dorrian

Interstate Hotels LLC must face trial on a server's claim that she was sexually harassed by a male bartender while working at the iconic Roosevelt Hotel's rooftop bar Mad46 in Manhattan, a federal judge ruled.

Civil Rights Agency's LGBT Stance Challenged Again in Court (1)

By Paige Smith

A group of Christian pastors and a private health-care company are once again alleging that the Equal Employment Opportunity Commission is infringing on their religious rights by pursuing LGBT discrimination cases on sex bias grounds.

Employer Groups Say New EEO-1 Pay Data Should Wait Until 2020

By Patrick Dorrian

It's impractical to expect employers to be able to collect and report by May 31, 2019, on the new types of pay data required by the U.S. government in its revised EEO-1 form, employer groups told a federal judge.

DISCRIMINATION

LGBT Rights Bill Gets Support During House Panel Consideration

By Tyrone Richardson

Legislation to extend discrimination protections to LGBT individuals nationwide should move forward, rights advocates urged a House committee.

WAGE & HOUR

U.S. Xpress Investors Sue Over Driver Shortage, Rising Wages

By Jennifer Bennett

U.S. Xpress Enterprises Inc. didn't tell investors in its 2018 initial public offering about a truck shortage and driver retention issues, an April 2 suit alleges.

More Bank of America Call Workers Certified on FLSA Wage Claims

By Porter Wells

Another set of Bank of America N.A. call center workers can move forward as a collective with their claims they had to perform off-the-clock work, a federal judge has ruled.

STATE & LOCAL LAWS

Maine Equal Pay Measure Passes on National Equal Pay Day

By Aaron Nicodemus

On National Equal Pay Day, Maine lawmakers passed a bill that discourages

employers from basing prospective workers' wages on their salary history in an attempt to promote pay equity between men and women.

HARASSMENT & RETALIATION

EEOC Sues Chili's Owner Over Alleged Harassment of Women

By Patrick Dorrian

Brinker Restaurant Corp. is accused in a new lawsuit of failing to prevent or stop the sexual harassment of female servers and hostesses at a Colorado Chili's.

Tenet Healthcare Allegedly Retaliated Against Top Heart Doctor

By Mary Anne Pazanowski

Tenet Healthcare Corp. allegedly fired a top U.S. heart doctor for refusing to take part in, and pressing executives about, government overbilling.

Wynn Officials Hid Sexual Harassment Claims, Probe Finds (3)

By Janelle Lawrence and Christopher Palmeri

Executives at Wynn Resorts Ltd. hid from Massachusetts gaming authorities allegations that Steve Wynn sexually harassed women, investigators working for the regulator said in a report April 2.

LABOR RELATIONS

UAW Official Pleads Guilty in Plot to Drain Fiat Worker Fund (1)

By Margaret Cronin Fisk and Steven Raphael

The former head of a United Auto Workers unit representing U.S. workers at Fiat Chrysler Automobiles NV plants pleaded guilty to taking part in a long-running conspiracy to siphon funds from a company training program, becoming the highest-ranked union official convicted in the probe.

New York Times' Wirecutter Staff Unionizes

By Andrew Wallender

About 80 editorial employees at Wirecutter, an online product review publication owned by The New York Times Co., voted to unionize April 2. Nearly 90 percent of the employees were in favor of organizing, according to the union.

Harley-Davidson Workers Split on New Contract Ratification

By Andrew Wallender

A small contingent of workers at Harley-Davidson's Wisconsin plants ratified a new, five-year labor agreement while two other local unions rejected the deal in a vote April 1, according to the company.

Unions at Work: San Francisco Bike-Share Workers Unionize

By Louis C. LaBrecque

Keep up-to-date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news.

IMMIGRATION

H-1B Spouses' Work Permits Don't Harm American Jobs, DHS Says

By Laura D. Francis

An Obama administration regulation granting work permits to the spouses of certain H-1B workers doesn't directly increase job competition for U.S. workers in the tech industry, the Homeland Security Department says.

HEALTH CARE & BENEFITS

Labor Department Wants Court Time to Support PwC Pensioners

By Jacklyn Wille

The Labor Department asked a federal appeals court for time to argue in

support of PriceWaterhouseCoopers LLP retirees who want their pensions recalculated.

Trump's Group Health Plans Told to Pay Claims Despite Ruling

By Madison Alder

Small business health insurance plans created under a Trump administration rule that a federal judge said violates the Affordable Care Act must continue to provide coverage and pay claims.

Putnam Again Presses for SCOTUS Review in 401(k) Lawsuit

By Jacklyn Wille

Putnam Investments LLC again urged the U.S. Supreme Court to hear the pending challenge to its 401(k) plan, reminding the justices that they've twice asked the U.S. Solicitor General to address the issue presented by this case.

Endo Pharmaceuticals Worker Wins Extra Benefits in 10th Cir.

By Jacklyn Wille

An Endo Pharmaceuticals Inc. employee won about $900 in extra monthly disability benefits after he convinced a federal appeals court that he qualified as a "salesperson" under the company's plan.

Columbia, Cornell Can't Limit Damages in Retirement Plan Suits

By Jacklyn Wille

Columbia University employees can seek up to $74 million in damages tied to a suite of allegedly underperforming retirement plan investments, despite the school's objection that their legal strategy amounted to "sandbagging."

SAFETY & HEALTH

Business Groups Renew Objections to Injury Reporting Rule

By Bruce Rolfsen

A revived federal lawsuit from employers challenging federal requirements for reporting workplace injuries and illnesses drops a previous objection but continues others.

Crushed Hand Whistleblower Case Heads to Trial in Pennsylvania

By Fatima Hussein

Nearly five years after a Lloyd Industries employee lost his hand in a workplace accident, a related whistleblower case against the company went to trial.

Patterson-UTI Settling Cases Over Workers Killed in Rig Explosion

By Sam Pearson

Oil and natural gas drilling company Patterson-UTI Energy Inc. has started settling wrongful death cases stemming from a 2018 rig explosion that killed five workers.

Labor Agency Employees Evacuated, Sickened by Office Air Quality

By Jaclyn Diaz

The federal agency responsible for enforcing worker safety laws is facing criticism from its own staff for a slow response in tackling an alleged unhealthy work environment in the department's headquarters in Washington, D.C., sources with ties to the department said.

ALSO IN THE NEWS

U.S. Wage Growth Rebounded in March, Glassdoor Pay Study Shows

By Shelly Hagan

U.S. wage growth rebounded in March following a sluggish start to the year with lower wage workers seeing the highest gains, according to the Glassdoor March Local Pay Report released April 2.

It's Been a Wild Ride for National Pay Inequality Awareness Day

By Jeff Green

Women in the U.S. earn on average 81 percent of what men do, a fact commemorated April 2 by what's come to be called "Equal Pay Day" -- the day to which a woman has to work to earn as much as a man did in the previous year.

LATEST CASES

Case: Discrimination/Retaliation (M.D. Pa.)

Valley View School District in Pennsylvania must face trial on retaliation claims brought by a teacher who says she wasn't chosen for either of two positions after she wrote a letter expressing her belief that she wasn't hired for a previous position due to age discrimination. It doesn't matter that she didn't specifically apply for the two positions or that one position was filled internally, because the school district knew she wished to be considered for open positions from her years of substitute teaching and completion of two rounds of interviews just weeks earlier, and the positions were filled less than a month after she sent her letter, the court said. The case is Zahradnik v. Valley View Sch. Dist., 2019 BL 113406, M.D. Pa., No. 3:16-1988, 3/30/19.

Case: Disability Discrimination/Work Assignments (D. Nev.)

A disabled U.S. Postal Service employee in Nevada is entitled to $19,922 in back pay after prevailing on her disability bias claims, because she showed that her supervisors scheduled her for almost a third fewer hours than her non-disabled co-workers due to her mental and physical disabilities. Her supervisors also over-punished her for a verbal altercation with a co-worker and attempted to force her into a conference room alone with another supervisor against whom she had a pending sexual harassment complaint, in an effort to trigger the employee's mental health issues so as to justify her reduced work hours and ultimate discharge, the court found. The case is Garity v. Donahoe, 2019 BL 114768, D. Nev., 2:11-cv-01805-RFB-CWH, 3/31/19.

Case: Wage & Hour/Independent Contractors (D. Mass.)

A Massachusetts salesman for a surge-protector manufacturer established that the company misclassified him as an independent contractor exempt from the state wage act. He was engaged in the usual course of the manufacturer's business, because an internal sales team accomplished most of its sales, the salesman's duties were largely similar to the internal sales employees, and it was financially dependent on his sales. The case is Valle v. Powertech Indus. Co., 2019 BL 114833, D. Mass., 17-cv-10196-DJC, 4/1/19.

Case: Wage & Hour/Hours Worked (E.D. Wis.)

Laborers for a Wisconsin concrete contractor didn't establish that the contractor is liable for failing to pay them for time they spent traveling between its shop and job sites, because the fact that their time cards reflected work performed both at the shop and the job site in a single day isn't enough, on its own, to show that the company had constructive knowledge of their unpaid travel time. The case is Laughlin v. Jim Fischer, Inc., 2019 BL 114776, E.D. Wis., 16-C-1342, 3/31/19.

Case: FMLA/Interference (D. Neb.)

A Lancaster County, Nebraska, paralegal in the child support division of the county attorney's office can go to trial with her Family and Medical Leave Act interference and retaliation claims after she was forced to resign two days before the start of FMLA leave for foot surgery, even though the county says that she was terminated for poor performance. Her difficulty in keeping up with her workload may be linked to her need to miss work for medical reasons, and in view of her long-standing history of performance problems, the timing of her termination raises a question as to why she wasn't fired earlier if her performance was the real reason for the county's action, the court found. The case is Weber v. County of Lancaster, 2019 BL 114730, D. Neb., 4:17-CV-3117, 4/1/19.

Case: Individual Employment Rights/Whistleblowing (5th Cir.)

A former tax director can't proceed with her claim alleging that Maverick Tube fired her in retaliation for expressing concerns about the undervaluation for tax purposes of a 10-year licensing deal for pipeline parts, worth $22.5 million, between one of its subsidiaries and a related company. The director didn't

show that she believed or warned Maverick that undervaluing the license was one of the enumerated crimes in a federal whistle-blower protection statute covering employees of publicly traded companies. The case is Bhandari v. Tube, 2019 BL 114032, 5th Cir., 18- 20668 Summary Calendar, 4/1/19.

Case: Disability Discrimination/Reasonable Accommodation (N.D. Ill.)

A recreation specialist for an Illinois special education cooperative can go to trial on her failure-to-accommodate claim after she was fired following her meltdown when assigned as the only leader at an overnight camp for disabled teens. She may show that the cooperative was aware that she struggled with stress, anxiety, fibromyalgia, and chronic fatigue, and sharing leadership functions with a co-leader may have been a reasonable accommodation given that a second staff member had been assigned to that role but was excused due to pregnancy, the court found. The case is Schiller v. N. Suburban Special Recreation Dist., 2019 BL 114608, N.D. Ill., No. 17 C 8514, 4/1/19.

Case: Disability Discrimination/Reasonable Accommodation (D.D.C.)

An asthmatic special agent candidate for the State Department's Bureau of Diplomatic Security can go ahead with her failure-to-accommodate claim after she was fired due to her inability to meet the time limit to complete a 1.5-mile-run training requirement, even though she wasn't able to perform the essential job function of physical fitness as measured through running. However, she may have been qualified for another position that didn't have the same fitness requirement and the State Department failed to engage in an interactive process to identify a viable accommodation, the court found. The case is Mitchell v. Pompeo, 2019 BL 113309, D.D.C., No. 1:15-cv-1849 (KBJ), 3/31/19.

Case: Disability Discrimination/Waiver (3d Cir.)

A Delaware community action agency can't overturn a jury finding that the agency failed to accommodate an ex-employee that it regarded as disabled due to dyslexia, even though a worker who is merely perceived as disabled isn't entitled to an accommodation under the ADA Amendments Act of 2008. The agency gave up its right to challenge the jury verdict on appeal when it continued to acquiesce to the employee's case theory, encouraged the

adoption of a pre-2008 jury instruction, and failed to note the error in its post-trial briefing, the Third Circuit ruled. The case is Robinson v. First State Cmty. Action Agency, 2019 BL 114665, 3d Cir., 17-3141, 4/1/19.

Case: Labor Relations/Alter Ego (6th Cir.)

A commercial HVAC contractor was not an alter ego, liable for union dues and benefit contributions under a pipe-fitting company's labor contract. Although the two businesses used similar names and the same accounting firm's mailing address, there is no evidence of shared finances or business operations, each business managed its own trade work, they never shared equipment or ownership, and each business had its own employees, who were not versed in the trade of the other. The case is United Association v. Humbert, 2019 BL 114479, 6th Cir., 18-3686/3691, unpublished 4/1/19.

Case: Discrimination/Sexual Harassment (S.D.N.Y.)

A female former cocktail server for hotel management company Interstate Hotels in Manhattan can proceed with her claim that a male bartender sexually harassed her for over three years, making frequent sexual comments such as on the appearance of her breasts, asking about her preferences in bed, showing her a pornographic video, as well as frequently shouting at her and ultimately accusing her of tip violations that led to her discharge, allegedly to undermine her career because she was a woman. She may argue his actions created a continuing violation of severe and pervasive harassment, as corroborated by several other female servers, and the company never took her complaints seriously, the court said. The case is Feldesman v. Interstate Hotels LLC, 2019 BL 115136, S.D.N.Y., 16 CIV. 9352 (ER), 3/31/19.

Case: Discrimination/Retaliation (N.D. Ill.)

Illinois Central Railroad prevails over a black former crew caller's claim that he was fired in retaliation for his complaints of racial discrimination, because the evidence clearly established that the decision-maker relied only on an investigation into his mistakes of improperly recording the status of trains and incorrectly scheduling fellow employees' leave, as well as his previous disciplinary history. Moreover, his only complaints of racial discrimination occurred six months earlier and were aimed at a supervisor who had since left

the company. The case is Anderson v. Ill. Cent. R.R., 2019 BL 114633, N.D. Ill., No. 17-cv-1387, 3/31/19.

Case: Individual Employment Rights/First Amendment (S.D.N.Y.)

A compliance coordinator for the Westchester County Health Corp. may go forward with her free-speech retaliation claim under the First Amendment, after she was fired by the public hospital because she posted an anti-Semitic comment on a local news organization's Facebook page while she was off-duty. The hospital argued that its interest in avoiding any association with such disruptive, potentially damaging speech outweighed her right to engage in it. The employee stated a viable claim because she alleges the hospital fired her for personal expression that wasn't intended to offend anyone, or be interpreted as anti-Semitic, the court said. The case is Festa v. Westchester Med. Ctr. Health Network, 2019 BL 112398, S.D.N.Y., No. 18-CV-1335 (KMK), 3/29/19.

Case: Discrimination/Discharge (S.D. Ind.)

A Nigerian-born statistical programming manager at a health and pharmaceutical consulting company loses his claims that he was let go based on his race or national origin, because he couldn't show that the company hadn't simply run out of work for him as it claimed. His team worked exclusively on projects, all of which had ended, and while his subordinate team members were able to find other roles within the company, there were no open managerial positions for him to fill, the court said. The case is Bio v. Inventiv Health Clinical, LLC, 2019 BL 113510, S.D. Ind., 1:16-cv-02546-TWP-MJD, 3/31/19.

From: Employment Law360
To: Ring, John
Subject: 5 Things To Watch As DOL Wades Into Joint-Employer Debate
Date: Wednesday, April 3, 2019 3:45:26 AM

EMPLOYMENT

Wednesday, April 3, 2019

TOP NEWS

Analysis

5 Things To Watch As DOL Wades Into Joint-Employer Debate

The U.S. Department of Labor's proposal to streamline its test for determining whether multiple businesses are jointly liable for wage violations puts the agency in the middle of a contentious debate over whether a tighter standard would let franchisors off the hook too easily. Here, Law360 looks at five things to keep an eye on as the comment period for the new rule gets underway.

Read full article »

DOL Releases Opinions On OT Exemptions, '8-And-80' Pay

The U.S. Department of Labor issued opinion letters Tuesday weighing in on Fair Labor Standards Act overtime exemptions for agricultural workers and teachers, and on health industry employers' use of an overtime structure that calculates workers' pay across two weeks.

Read full article »

Labor Dept. Looks To Speed Up Contractor Debarment

The U.S. Department of Labor kicked off a new pilot program Tuesday that aims to speed up the discretionary suspension and debarment process to protect the federal government from working with contractors involved in inappropriate or illegal activities.

Read full article »

Dukes Dooms Pay Bias Class Appeal, Microsoft Says

Microsoft hit back at claims a Washington federal judge perverted the U.S. Supreme Court's seminal class bias ruling when he rejected workers' proposed 8,600-member pay equity class, telling the Ninth Circuit the suit is exactly the sort the high court called unworkable in Wal-Mart v. Dukes.

Read full article »

Wynn Execs Hid Abuse Allegations, Mass. Probe Reveals

Executives for Wynn Resorts concealed sexual abuse allegations against former CEO and chairman Steve Wynn from gambling regulators, according to an investigation released Tuesday by the Massachusetts Gaming Commission as hearings began to determine whether the company should maintain its license for a casino set to open in Boston.

Read full article »

Sen. Graham Floats Idea Of National Arbitration Standards

Senate Judiciary Committee Chairman Lindsey Graham, R-S.C., floated the idea Tuesday of establishing uniform standards for arbitration clauses and questioned whether class action rules should be reformed during a hearing on complaints that arbitrations unfairly sweep issues under the rug.

Read full article »

DISCRIMINATION

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New Cases

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Lieff Cabraser
Lindabury McCormick

U. of Colorado Defeats Receptionist's FMLA Firing Suit

A Colorado federal judge ruled Tuesday that the University of Colorado didn't violate the Family and Medical Leave Act when it fired a receptionist, since there wasn't evidence that her termination stemmed from her inquiry about taking time off.

Read full article »

Prof's $1.25M Retaliation Award Cut, Email Monitoring Nixed

A New York federal judge slashed from $1.25 million to $750,000 a retaliation award a jury last year gave a former Columbia University finance professor who alleged a colleague sabotaged her career after she spurned his advances, also denying her bid to monitor his email.

Read full article »

WAGE & HOUR

$3.56M Settlement Ends Cabot Misclassification Suit

A Pennsylvania federal judge on Tuesday gave the final okay to a $3.56 million deal to settle a class and collective action claiming Cabot Oil and Gas Corp. stiffed workers out of overtime by misclassifying them as independent contractors.

Read full article »

LABOR

Ex-Head Of UAW's Fiat-Chrysler Dept. Cops To Corruption

The former head of the United Auto Workers' Chrysler department copped to a criminal conspiracy charge in Detroit on Tuesday, marking the eighth guilty plea tied to a corruption probe into the union and the automaker.

Read full article »

Pa. Panel Rejects Bid To Ax AFSCME As Workers' Sole Union

A Pennsylvania appeals court on Tuesday upheld decisions finding that two efforts to remove the American Federation of State, County and Municipal Employees as the exclusive bargaining unit representing certain state workers lacked enough support to get off the ground.

Read full article »

NONCOMPETES

Court Frees Ex-ADP Sales Reps. From Noncompetes

A New Jersey federal judge Tuesday lifted his preliminary injunction enforcing ADP's noncompete agreements with two former sales representatives, ruling that the company's one-year covenants had long expired even if their claims have not.

Read full article »

Wells Fargo Unit's Sale Didn't Ax Noncompetes, Pa. Panel Told

Wells Fargo's sale of subsidiary Wells Fargo Insurance Services in 2017 didn't erase the insurance unit's interest in upholding the noncompete and nonsolicitation agreements in its employees' contracts, an attorney for WFIS argued Tuesday at the Superior Court of Pennsylvania.

Read full article »

WHISTLEBLOWER

Senate Panel To Probe FAA Inspectors After Boeing Crashes

Senate lawmakers on Tuesday said they will investigate whistleblower reports that Federal Aviation Administration safety inspectors weren't sufficiently trained to evaluate and approve the Boeing 737 MAX 8 aircraft involved in a pair of recent fatal crashes.

Read full article »

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Porter Wright
Proskauer Rose
Sanford Heisler Sharp
Seyfarth Shaw
Shook Hardy
Sidley Austin
Ward & Herzog
White & Case
Willig Williams

COMPANIES

Altman Weil Inc.
American Bar Association
American Federation of State, County and Municipal Employees
Automatic Data Processing Inc.
Berkeley Research Group
Cable News Network Inc.
Delta Air Lines Inc.
Edgewood Partners Insurance Center Inc.
Ethiopian Airlines Enterprise
Federalist Society
ICx Technologies, Inc.
International Franchise Association
Juul Labs
LinkedIn Corp.
McKesson Corp.
Microsoft Corp.
Nardello & Co.
National Employment Law Project
Nike Inc.
TJX Companies Inc.
The Boeing Company
The Coca-Cola Co.
The Walt Disney Co.
Trump Organization Inc.
USI Insurance Services
Uber Technologies Inc.
United Auto Workers
Wal-Mart Stores Inc.
Walt Disney Parks & Resorts Worldwide Inc.
Wells Fargo & Co.

NEGLIGENCE

Uber Hit With $10M Suit By Rider Who Was Sexually Assaulted

A woman has filed a $10 million lawsuit against Uber in D.C. federal court, seeking to hold the company responsible after a driver trapped and sexually assaulted her in his car after picking her up.

Read full article »

PEOPLE

Epstein Becker Adds Littler Atty To Employment Practice

Epstein Becker Green has bolstered its ranks in New York City by bringing over an attorney from Littler Mendelson PC who has represented some big-name employers like Uber in high-stakes employment cases.

Read full article »

EXPERT ANALYSIS

Assessing Employee Exemption Under DOL Overtime Regs

Recently proposed changes to the U.S. Department of Labor's so-called overtime rules will likely leave many employers with worker classification questions. Elizabeth Arnold and Chester Hanvey of Berkeley Research Group discuss several scientifically based methods for evaluating employees' exemption status.

Read full article »

What To Do While Waiting For Cadillac Tax To Hit The Road

Despite growing bipartisan momentum to repeal the Affordable Care Act's "Cadillac tax" provision, employers must consider the impact it would have on their current benefits structure and maintain flexibility to change benefit offerings or pass along costs once it is implemented, says Stephanie Vasconcellos of Mayer Brown.

Read full article »

LEGAL INDUSTRY

Small Firm Consolidations Continue At Rapid Clip

Law firm consolidation continued apace in the first quarter of 2019, driven largely by deals in which large firms gobbled up firms with fewer than 10 attorneys, according to a report released Tuesday.

Read full article »

Trump Taps Investigations Firm GC For Georgia Bench

President Donald Trump nominated an investigations firm's general counsel on Tuesday to serve as a Georgia federal judge and tapped a federal bankruptcy judge to serve on the federal bench in West Virginia.

Read full article »

How The ABA Judicial Ratings Lost Their Luster

Some six years before he became chairman of the Senate Judiciary Committee, Sen. Lindsey Graham said the American Bar Association's ratings of judicial nominees were the "gold standard." But like everything else relating to the judiciary, the ABA's work has been politicized.

Read full article »

Senate Readies 'Nuclear Option' On Nomination Debate Time

The U.S. Senate is on the verge of blowing up yet another part of its rules with a simple-majority "nuclear option" vote as early as Wednesday, as Republican efforts to speed judicial confirmations by shortening debate time fell short of a filibuster-proof majority on Tuesday.

Read full article »

Wynn Resorts Ltd.

GOVERNMENT AGENCIES

California Supreme Court
Congressional Budget Office
Federal Aviation Administration
Federal Bureau of Investigation
Federal Trade Commission
Food and Drug Administration
Massachusetts Gaming Commission
National Labor Relations Board
Nevada Gaming Control Board
U.S. Army
U.S. Attorney's Office
U.S. Department of Health and Human Services
U.S. Department of Homeland Security
U.S. Department of Justice
U.S. Department of Labor
U.S. Department of Transportation
U.S. House of Representatives
U.S. Senate
U.S. Supreme Court
Wage and Hour Division

Trump Org. Chief Compliance Counsel To Step Down In June

The man in charge of legal compliance for the Trump Organization, George A. Sorial, will hand the reins to assistant general counsel Jill Martin in June, the outgoing attorney confirmed to Law360 on Tuesday.

Read full article »

Avenatti's Ex-Clients Say He Exposed Them To Legal Woes

Two former clients of lawyer Michael Avenatti accused him Tuesday of secretly funneling fees from a $39 million settlement and drawing the pair into "seven years of unnecessary litigation" with another attorney over those fees.

Read full article »

3 Months Into The Job, Texas Judge Accidentally Resigns

A Harris County, Texas, civil court judge is scrambling to stay on the bench after accidentally resigning three months into the job.

Read full article »

Gibson Dunn Health Chair Tapped As Catholic U. Law Dean

The chair of Gibson Dunn's Food and Drug Administration and health care practice group is set to become the new dean of Catholic University's Columbus School of Law, the university announced Tuesday.

Read full article »

Ex-Mass. AG Leaves Foley Hoag For E-Cigarette Maker Juul

Former Massachusetts Attorney General Martha Coakley will join the government affairs team at e-cigarette maker Juul this month, the company announced Tuesday, saying she would work on education efforts to combat youth usage of the controversial product.

Read full article »

Uber Health Picks Up McKesson Atty As Legal Director

Uber Health, the transportation network's year-old platform that allows hospitals and other health care providers to request rides for patients, has hired a McKesson Corp. assistant general counsel as its legal director, the venture confirmed to Law360 on Tuesday.

Read full article »

GovExec Today

April 3, 2019

VA Defends Its Firing Law in Court Against Multiple Constitutional Challenges // Eric Katz

Trump's signature civil service reform hangs in the balance.

Major League Baseball and the Trump Administration's Common Approach to Labor Issues // Erich Wagner

A league department aimed at improving teams' performance in salary arbitration appears markedly similar to a White House working group designed to make union negotiations "more efficient."

EPA Chief Admits That Brain Drain Puts Agency at 'Critical Juncture' // Charles S. Clark

Wheeler defends Trump budget cuts that lawmakers of both parties resist.

Is Pay for Performance as Bad As the Critics Contend? // Howard Risher

Employees have any number of other reasons for stress at work.

The Navy Is Assembling a Hacker Team to Fight Off Small Drones // Marcus Weisgerber

Engineers, researchers, and hackers will seek ways to protect warships and bases from hobby-type drones modified to kill.

GSA Adds Crown-Jewel Protection to Cybersecurity Services // Heather Kuldell

The General Services Administration revamped Highly Adaptive Cybersecurity Service offerings with high-value assets in mind.

Suicide Risk Grew After Missouri Medicaid Kids Shifted To Managed Care, Hospitals Say // Phil Galewitz and Kaiser Health News

Psychiatric treatment for children in Medicaid managed-care plans in Missouri has declined and

suicide risks are up, reveals a study sponsored by the state hospital association.

OPM Is Giving CIOs More Direct Hiring Authority But Plans To Keep A Watchful Eye // Aaron Boyd

The administration has been gathering feedback on giving agency CIOs more power over direct hiring authorities and plans to publish the final rule soon.

Gun-Rights Counties Vow to Resist New State Restrictions // Matt Vasilogambros

As legislatures approved new firearm laws over the last year, some counties have resisted, calling themselves Second Amendment 'sanctuaries.'

Government Executive Media Group, 600 New Hampshire Avenue NW, Washington, DC 20037

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Labor Secretary Faces Lawmakers Amid Epstein Probe
Date: Wednesday, April 3, 2019 7:10:01 AM

What you need to know to start your day.

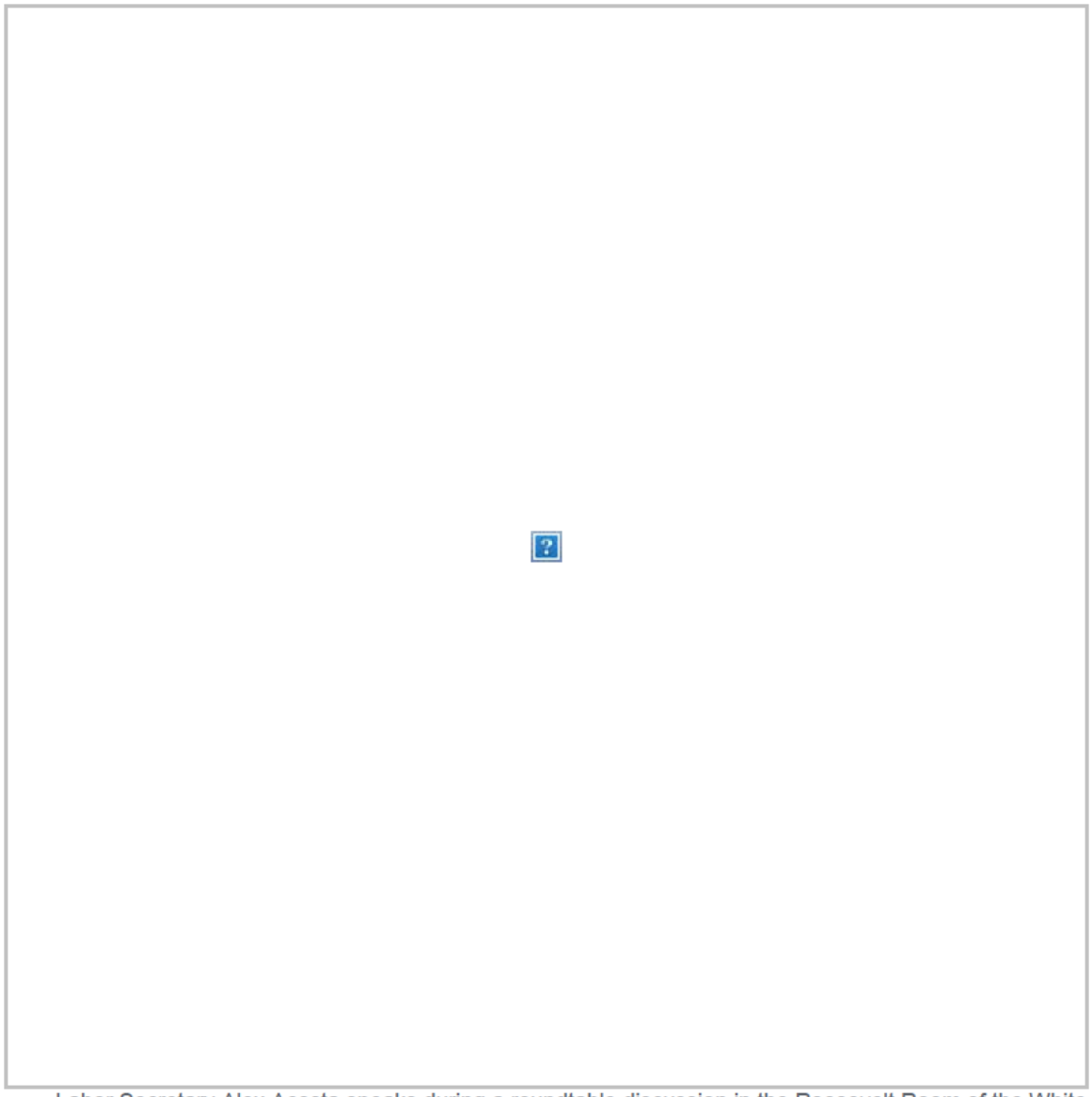
Labor Secretary Faces Lawmakers Amid Epstein Probe

By Patricio Chile

Labor Secretary Alexander Acosta will testify this afternoon before a House Appropriations subcommittee. The hearing is Acosta's first public meeting with lawmakers after some Democrats have called for him to step down over his role in a plea deal for accused teen sex trafficker Jeffrey Epstein.

- **Epstein Eyed:** At least one subcommittee member, Rep. Lois Frankel (D-Fla.), has already said she wants Acosta to resign. The labor secretary was the lead federal prosecutor in Miami who approved a plea deal that allowed **Epstein** to avoid harsh punishment and instead serve 13 months in state prison.

- **Talking Points:** Democrats have a long list of items they'd like to discuss with Acosta. That includes the DOL's request for more **apprenticeship** money, its new overtime rule, and lingering questions about a scuttled tip-sharing regulation.



Labor Secretary Alex Acosta speaks during a roundtable discussion in the Roosevelt Room of the White House in Washington on Jan. 23.
MANDEL NGAN/AFP/Getty Images

VISA CHARGES SOUGHT TO REDUCE DEFICIT

For the second year in a row, the Trump administration has tucked a proposed 10 percent "immigration services surcharge" in its budget proposal, which would use funds collected from visa applications to reduce the federal deficit.

- **Deterrent Effect:** The extra money immigrants and employers would owe over and above what they already pay in **fees** could drive away would-be applicants, Laura D. Francis reports.

- **Modest Proposal:** The proposal only would put a $466 million dent in the

deficit in the first year, making it a more modest proposal than other immigrant-focused options.

WHAT ELSE WE'RE WATCHING

- **Successor Companies:** The **NLRB** in a decision overturning precedent yesterday dialed back the remedy it imposes on companies for using a type of **unlawful hiring scheme** when they takeover unionized workplaces.

- **Protective Gear:** The cancellation of the first **all-female space walk** due to the lack of spacesuits sized to fit a female body highlights an issue facing women in male-dominated workplaces: Women in many industries struggle to find properly fitting protective gear to do their jobs. Fatima Hussein and Jaclyn Diaz have the story.

- **Health Coverage:** The latest effort by restaurants to attract and retain staff involves offering workers **health insurance coverage**, and some eateries are adding a portion of the cost onto their bills to show customers they're supporting worker benefits. Madison Alder and Paige Smith have the story.

- **Wage and Hour:** The Labor Department yesterday issued a trio of new opinion letters. The missives explain DOL's position on certain **wage and hour** issues for residential care facilities, public universities, and agriculture product transportation businesses.

- **Paid Leave:** The American Enterprise Institute today will host Sen. Bill Cassidy (R-La.) to discuss various proposals for a national **paid family leave** program.

- **Staying Power:** Baby Boomers are crossing over the customary retirement age, but an expected wave of partner departures has yet to surface since **many lawyers are working past 65**, and some into their 70s. Elizabeth Olson has the story.

- **Agriculture's Future:** The House Judiciary Immigration and Citizenship Subcommittee is scheduled to have a hearing today titled, "Securing the Future of American Agriculture," which will focus on **immigration** and **farm labor**.

- **Work Suits:** Lockheed Martin Aeronautics Co. was accused of engaging in defense contract frauds, according to a **whistleblower** lawsuit filed in federal court. Read about this and other cases in our weekly "New Work Suits."

- **Future of Work:** The Aspen Institute is hosting an event today called "The Age of Automation: Policies for a Changing Economy." The group's event comes amid a growing calls for federal lawmakers to regulate and help prepare workers for "future of work" technology such as **automation** and **artificial intelligence.**

- **Services Sector:** The Institute for Supply Management releases its March **services sector** report at 10 a.m.

PRACTITIONER INSIGHTS

Avoiding Women Is No #MeToo Answer--Good Training, Messaging Is
Since the #MeToo movement started, employers are working to prevent and respond to sexual misconduct, but now many men may feel at risk and avoid women altogether. Jonathan Segal of **Duane Morris** offers training and messaging tips for employers to ease the anxiety some men feel in the workplace.

DAILY RUNDOWN

Top Stories

Halliburton Worker Must Arbitrate Age and Disability Claims
A Halliburton employee who says he was fired because of his age and his disability must arbitrate his claims, a federal judge ruled.

Roosevelt Hotel Server Gets Harassment Trial Against Interstate
Interstate Hotels LLC must face trial on a server's claim that she was sexually harassed by a male bartender while working at the iconic Roosevelt Hotel's rooftop bar Mad46 in Manhattan, a federal judge ruled.

Civil Rights Agency's LGBT Stance Challenged Again in Court
A group of Christian pastors and a private health-care company are once again alleging that the Equal Employment Opportunity Commission is infringing on

their religious rights by pursuing LGBT discrimination cases on sex bias grounds.

Employer Groups Say New EEO-1 Pay Data Should Wait Until 2020
It's impractical to expect employers to be able to collect and report by May 31, 2019, on the new types of pay data required by the U.S. government in its revised EEO-1 form, employer groups told a federal judge.

Discrimination

LGBT Rights Bill Gets Support During House Panel Consideration
Legislation to extend discrimination protections to LGBT individuals nationwide should move forward, rights advocates urged a House committee.

Wage & Hour

U.S. Xpress Investors Sue Over Driver Shortage, Rising Wages
U.S. Xpress Enterprises Inc. didn't tell investors in its 2018 initial public offering about a truck shortage and driver retention issues, a suit alleges.

Harassment & Retaliation

Tenet Healthcare Allegedly Retaliated Against Top Heart Doctor
Tenet Healthcare Corp. allegedly fired a top U.S. heart doctor for refusing to take part in, and pressing executives about, government overbilling.

State & Local Laws

Maine Equal Pay Measure Passes on National Equal Pay Day
On National Equal Pay Day, Maine lawmakers passed a bill that discourages employers from basing prospective workers' wages on their salary history in an attempt to promote pay equity between men and women.

Labor Relations

New York Times' Wirecutter Staff Unionizes
About 80 editorial employees at Wirecutter, an online product review publication owned by The New York Times Co., voted to unionize. Nearly 90 percent of the employees were in favor of organizing, according to the union.

Harley-Davidson Workers Split on New Contract Ratification

A small contingent of workers at Harley-Davidson's Wisconsin plants ratified a new, five-year labor agreement while two other local unions rejected the deal in a vote, according to the company.

Immigration

H-1B Spouses' Work Permits Don't Harm American Jobs, DHS Says
An Obama administration regulation granting work permits to the spouses of certain H-1B workers doesn't directly increase job competition for U.S. workers in the tech industry, the Homeland Security Department says.

WORKFLOWS

Wilmer Cutler Pickering Hale and Dorr rehired Daniel Gallagher, a former commissioner with the U.S. Securities and Exchange Commission, to serve as deputy chair of the firm's securities department in Washington, DC and New York | **LeClairRyan** hired Eammon Moran as partner in Washington, DC from Kilpatrick Townsend & Stockton | **Lowenstein** has added former SDNY assistant U.S. attorney Rachel Maimin and former U.S. Securities & Exchange Commission senior counsel **H. Gregory Baker** in its white-collar criminal defense practice in New York | **Katten Muchin Roseman** hired Steven Mindy in the transactional tax practice in DC from Alston & Bird | **Akin Gump Strauss Hauer & Feld** added Virgil Miller as a senior policy adviser in Washington, DC (he was an aide to U.S. Rep. Cedric Richmond, D-La., and a staffer on the House Energy and Commerce Committee); and has appointed Allen Shyu as a partner in the Beijing office from Stephenson Harwood | **Baker Botts** hired Jeffrey Wood, former acting assistant attorney general for the Department of Justice's environment and natural resources division, as a partner in Washington, DC | **DLA Piper** hired Conor Houlihan as head of the finance practice in the firm's newly opened Dublin office, arriving from Irish firm Dillon Eustace

For all of today's Bloomberg Law headlines, visit Daily Labor Report

From: Martin, Andrew
Subject: Legal News FYI 04-03-19
Date: Wednesday, April 3, 2019 7:56:09 AM
Attachments: image001.png

Wednesday, April 3, 2019

Town Could Ban 12-Foot Inflatable Rat from Picketing Line

HR Magazine 03 Apr 2019 07:18

A court permitted a town to ban a union from displaying a 12-foot inflatable rat at an informational picke ing site by finding that the town's ordinance did not violate the First Amendment, according to the 7th U.S. Circuit Court of Appeals. Scabby the...

Labor Secretary Faces Lawmakers Amid Epstein Probe

BloombergLaw - Daily Labor Report 03 Apr 2019 07 06

By Patricio Chile Labor Secretary Alexander Acosta will testify this afternoon before a House Appropriations subcommittee. The hearing is Acosta's first public meeting with lawmakers after some Democrats have called for him to step down over his role in...

Waiving Class-Wide Arbitrations in Construction Contracts

JD Supra 02 Apr 2019 08:32

Companies routinely turn to arbitration as an efficient and cost-effec ive means of resolving disputes. Increasingly, these same companies use arbitration to prohibit consumers and employees from commencing class ac ions. While certain courts look with...

NLRB Decision Makes it Easier to Classify Workers as Independent Contractors – For Union Purposes

JD Supra Legal Alerts 02 Apr 2019 08:12

Cohen & Grigsby, P.C

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From:	Haley, Vickie
To:	Hadsall, Jennifer A.; Carlton, Peter J.; Emanuel, William; Free, Douglas; Giannasi, Robert (ALJ); Jacob, Fred; Kaplan, Marvin E.; Krafts, Andrew J.; Kyle, John; Lennie, Rachel G.; Lucy, Christine B.; McFerran, Lauren; Murphy, James R.; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Stock, Alice B.; Zick, Lara S.
Subject:	(Brief) Board Case No. 18-CA-160654; Docket Nos. 18-1155; 18-1244; Ingredion, Inc. v. National Labor Relations Board
Date:	Wednesday, April 3, 2019 9:31:03 AM
Attachments:	Indgredion Inc v NLRB (18-1155) Brief.pdf

Attached please find an electric copy of the Board's brief in the following case Ingredion, Inc. v. National Labor Relations Board.

Thanks,

Vickie Haley
Administrative Assistant
Appellate and Supreme Court Litigation Branch
1015 Half Street, SE, Suite 4131C
Washington, DC 20570
202-273-3732

Nos. 18-1155, 18-1244

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INGREDION, INC.
d/b/a PENFORD PRODUCTS CO.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

LOCAL 100G, BAKERY, CONFECTIONERY,
TOBACCO WORKERS & GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO, CLC
Intervenor

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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Assistant General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INGREDION, INC.	)	
d/b/a PENFORD PRODUCTS CO.	)	
Petitioner/Cross-Respondent	)	Nos. 18-1155, 18-1244
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
Respondent/Cross-Petitioner	)	18-CA-160654
	)	18-CA-170682
and	)	
	)	
LOCAL 100G, BAKERY, CONFECTIONERY,	)	
TOBACCO WORKERS & GRAIN MILLERS	)	
INTERNATIONAL UNION, AFL-CIO, CLC	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Intervenor

Ingredion, Inc. d/b/a Penford Products Co. ("Ingredion") was the respondent before the Board and is the Petitioner/Cross-Respondent before the Court. The Board's General Counsel was a party before the Board in the unfair-labor-practice proceeding. The Board is the Respondent/Cross-Petitioner before the Court. Local 100G, Bakery, Confectionery, Tobacco Workers & Grain Millers International Union ("the Union") was the charging party before the Board, and is the Intervenor in this court proceeding.

B. Rulings Under Review

This case is before the Court on Ingredion's petition for review and the Board's cross-application for enforcement of an unfair-labor-practice Decision and Order of the Board, issued on May 1, 2018, and reported at 366 NLRB No. 74. The Board seeks full enforcement of that Order.

C. Related Cases

The case on review was not previously before this Court or any other court. Ingredion filed an initial petition for review of the Board's Decision and Order docketed at D.C. Cir. No. 18-1126, which was later voluntarily dismissed and refiled as docketed at D.C. Cir. No. 18-1244. Board counsel is unaware of any related cases currently pending in this Court or any other court.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 2nd day of April, 2019

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Statutes

* Authorities upon which we chiefly rely are marked with asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1155, 18-1244

INGREDION, INC.
d/b/a PENFORD PRODUCTS CO.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

LOCAL 100G, BAKERY, CONFECTIONERY,
TOBACCO WORKERS & GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO, CLC
Intervenor

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Ingredion, Inc., d/b/a Penford Products Co. ("Ingredion") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Decision and

Order issued against Ingredion on May 1, 2018, and reported at 366 NLRB No. 74. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended ("the Act"). 29 U.S.C. § 160(a). The Board's Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. Local 100G, Bakery, Confectionery, Tobacco Workers & Grain Millers International Union ("the Union") intervened in support of the Board.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's findings that Ingredion violated Section 8(a)(5) and (1) of the Act by dealing directly with bargaining-unit employees, unreasonably delaying its provision of bargaining-related information, threatening employees with job loss in the event of a bargaining-related strike, and denigrating the Union by misrepresenting its bargaining positions.

2. Whether substantial evidence supports the Board's finding that Ingredion violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its last offer without having reached a valid impasse in bargaining with the Union.

3. Whether the Board acted within its broad discretion in ordering a notice-reading remedy.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached Addendum.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; Ingredion's Director of Human Resources Visits the Facility

Ingredion is a multinational corporation that manufactures and sells various products for food and industrial uses. (A.2191; A.1966.)[1] In March 2015, Ingredion purchased Penford Products Co. and its corn-milling facility located in Cedar Rapids, Iowa. (A.2191; A.1966.) The Union represents a bargaining unit of 165 production and maintenance employees at the Cedar Rapids facility, and has represented the unit since 1948. (A.2191; A.2022-23.) At the time of its purchase by Ingredion, Penford Products was party to a collective-bargaining agreement with the Union that was set to expire in August 2015. (A.2191; A.425-517.) Ingredion recognized the Union and continued to operate the facility under the terms of the existing agreement. (A.2191; A.2092.)

On April 6, 2015, Ingredion's Director of Human Resources, Ken Meadows, visited the Cedar Rapids facility. (A.2191.) As part of his visit, Meadows met

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[1] "A." refers to the deferred appendix filed by Ingredion. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Ingredion's opening brief.

with the Union's local officers. (A.2191-92.) During the meeting, another manager mentioned the employees' existing health-insurance coverage and pension benefits. (A.2191-92; A.1973, 1987-88.) In response to both topics, Meadows waved his hand and said "bye-bye." (A.2192; A.1794, 1973, 1987-88.) Meadows mentioned that there were going to be radical changes in the next contract, that he had been through many negotiations and knew how they worked, and that if the Union chose to strike then Ingredion could replace the employees. (A.2192; A.1794, 1973, 1987-88.)

After leaving his meeting with the union officials, Meadows toured the facility with two managers and spoke to several bargaining-unit employees on the shop floor. (A.2193; A.1967.) Speaking to employees in the ethanol control room, Meadows introduced himself and explained that he would be negotiating the next contract for Ingredion. (A.2193; A.1960-62, 1964-65.) Meadows then asked the employees what they would be looking for in a contract. (A.2193; A.1960-62, 1964-65.) For the next twenty-five minutes, Meadows discussed a variety of substantive proposals with the employees, including retiree health insurance, wage increases, vacation scheduling, staffing levels, rotating shift scheduling, and seniority-based vacation benefits. (A.2193; A.1960-62, 1964-65, 2027-29.) Meadows told the employees that the existing health-insurance plan was subject to a "Cadillac tax," that the employees would have Ingredion's insurance plan

instead, and that the employees' pensions were a thing of the past and would be going away. (A.2193; A.1960-62, 1964-65.)

Meadows and the two managers accompanying him also spoke to an employee in the dry-starch department, who was informed that Meadows was going to be the chief negotiator for Ingredion and who was asked what he would like to see in the next contract. (A.2193-94; A.1956-57.) The employee suggested that he would like to see a $5 raise in his pension multiplier, to which Meadows replied that he did not think the employee was going to see that. (A.2193-94; A.1956-57.) When the employee raised the issue of retiree health insurance, Meadows responded that the employee did not need such insurance unless he planned to retire soon. (A.2194; A.1956-57.)

B. Ingredion Initiates Bargaining; the Union Requests Benefits-Related Information

On May 11, Ingredion provided the Union with formal notice of its intent to terminate the expiring collective-bargaining agreement. (A.2194; A.1774.) The Union sent a letter to Ingredion on May 13 requesting a variety of information in anticipation of bargaining, including: the total dollar costs and accounting method for the costs of fringe benefits for the previous year; the cents-per-hour individual cost for each dollar increase to the defined-benefit pension multiplier; and the cents-per-hour individual cost for each 1% increase in the direct-contribution plan. (A.2195; A.2099.)

C. The Parties Begin Bargaining in June and Exchange Initial Proposals; the Union Renews Its Previous Information Request

Ingredion and the Union commenced bargaining in June. (A.2195; A.1625-27.) Meadows served as the chief negotiator for Ingredion. (A.2191; A.1627.) The Union's chief negotiators were international vice president Jethro Head and local president Christopher Eby. (A.2191; A.1627.)

On June 1, the parties met briefly to exchange initial bargaining proposals. (A.2195; A.1990-91, 2098.) The Union's proposals were based on the expiring agreement at the Cedar Rapids facility. (A.2195; A.312-16, 425-517.) Ingredion's proposal set forth an entirely new contract in both form and substance, and bore no resemblance to the existing agreement. (A.2195; A.2-38.) Meadows indicated that his goal was ultimately to get a contract, but that Ingredion was not Penford Products and that his proposal contained radical changes. (A.2195; A.1713, 1750, 1991.) Meadows read from a document stating that Ingredion was requesting that "the entirety of the parties' collective-bargaining agreement, and all of its Articles and Sections, be reopened and renegotiated," and that there were no provisions that Ingredion proposed "to remain unchanged." (A.2195; A.1817.)

On June 29, the parties met for a four-hour bargaining session. (A.2196; A.1991-94.) At the start of the session, Head presented a letter renewing the Union's earlier request for information regarding fringe benefits and pension costs. (A.2196; A.1770.) In response, Meadows stated that he did not intend to provide

pension-related information because Ingredion's proposed agreement did not contain a pension provision. (A.2196; A.1991.) Meadows also went through each of the Union's initial proposals, in less than ten minutes, and stated that he was "not interested" in the majority of them. (A.2196; A.1715-16, 1979-80, 1992.) Meadows did not explain further. (A.2196; A.1992, 2048.) The Union later presented additional non-economic proposals. (A.2196; A.318-21.)

On June 30, the parties met for approximately one hour and twenty minutes. (A.2196; A.1994-95.) Ingredion provided the Union with a second proposed agreement making several changes to its initial proposal. (A.2196; A.40-77.)[2] Near the start of the session, Head stated that the parties needed to come up with an "agreed-upon process" so that they could "actually have negotiations," rather than simply saying "not interested." (A.2196; A.1718, 1753, 1994.) Meadows stated that he was not coming off his proposed agreement, that he was willing to put together a last, best, and final offer, and that the Union would see work going on in the Cedar Rapids facility related to that. (A.2196; A.1719, 1753, 1976, 1994.) Subsequent to the meeting, the Union created a list of the many concessions that Ingredion was proposing relative to the expiring agreement. (A.2197; A.1782-85.)

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[2] The changes between Ingredion's initial proposal, its subsequent offers, and its last, best, and final offer are summarized in a chart at A.1807-08.

D. Ingredion's Managers State That Employees Might Lose Their Jobs if They Strike and That They Should Convince the Union to Start Bargaining over Improved Benefits

In mid-July, as the expiration date of the existing agreement approached, a group of employees on the shop floor began discussing the ongoing negotiations and the possibility of a bargaining-related strike. (A.2206; A.1957-58.) They were approached by Facility Manager David Vislisel, who told the employees that they "might want to think long and hard about walking out on these people," because Ingredion had "deep pockets and lots of plants that make the same thing you do." (A.2206; A.1957-58.) Vislisel warned that employees "may not get back in the door if you go out." (A.2206; A.1957-58.)

Also in mid-July, two employees who were considering retiring by the end of the month were separately approached by Operations Manager David Roseberry, who explained that he had been instructed to speak with them by Meadows. (A.2205; A.2041-42, 2044-45.) Roseberry told the employees that they should wait to retire because Ingredion was seeking improved retirement benefits. (A.2205; A.2041-42, 2044-45.) Roseberry told the employees to convince the Union to start negotiating over Ingredion's proposals. (A.2205; A.2042, 2045.)

E. The Parties Continue Bargaining in July and Make Slow Progress; the Union Again Renews Its Information Request

The parties did not meet again until July 27, when they met across three and a half hours with a federal mediator present. (A.2197; A.1995-96.) During the meeting, Meadows told the Union that he had already addressed their proposals, and that the provisions of the expiring contract did not allow Ingredion to "grow." (A.2197; A.1720, 1996.) When Head asked how they did not allow Ingredion to grow, Meadows did not answer. (A.2197; A.1996.)

On July 28, the bargaining session lasted approximately twelve hours. (A.2197-98; A.1996-2001.) Ingredion presented a revised proposed agreement that contained retiree health insurance, which was discussed for the first time, as well as a wage proposal establishing a permanent two-tier wage scale. (A.2197-98; A.79-116, 1722-24, 1996-98.) The only explanation that Meadows offered for the permanent two-tier wage scale was that Ingredion required "economic adjustment." (A.2198; A.1902, 2049-50.) Beginning in its July 28 offer, Ingredion began including a provision granting it the authority to switch the normal workday from eight hours to twelve hours "if at least 65% of the classification votes to go to a 12 hour shift." (A.92 art.X.)

On July 29, the parties met across approximately eight hours. (A.2198-99; A.2002-04.) Meadows gave the Union another proposed agreement including several changes. (A.2198; A.118-55, 569-71, 1807-08.) After the Union presented

its list of the concessions that Ingredion was seeking relative to the expiring agreement, the parties had productive discussions on various issues. (A.2198-99; A.1725-30, 1782-85, 2003-04.)

On July 30, the parties met for approximately five hours. (A.2199; A.2006-08.) The Union provided Ingredion with a new written information request seeking, among other things, the three items previously requested in June and May. (A.2199; A.1111-12.) The parties also discussed a revised proposal from Ingredion that included several further changes. (A.2199; A.157-94, 2007.)

On July 31, the parties met for six and a half hours. (A.2199-2200; A.2008-09.) Ingredion presented a revised proposal that, for the first time, included language on regular medical insurance. (A.2199; A.196-232.) The parties also engaged in substantive discussions for the first time regarding proposed changes to the defined-benefit pension plan in the expiring agreement. (A.2199; A.323, 1732-33.) Given that the existing contract was set to expire the following day, Head suggested that he was willing to take an offer from Ingredion to employees for a vote. (A.2200; A.2009.) After a caucus, Ingredion presented a "final offer" that improved its proposed wage increase. (A.2200; A.234-70.) During this bargaining session, Ingredion finally provided the Union with all of the previously requested information. (A.2200; A.2009.)

F. The Parties Continue Bargaining in August After the Employees Overwhelmingly Reject Ingredion's Offer; Ingredion Declares Impasse in Mid-August

The parties' existing agreement expired on August 1. (A.2200; A.511.) On the same day, the Union presented Ingredion's "final offer" to the bargaining-unit employees, with approximately 95% voting against it. (A.2200; A.2010.)

The parties next met for six hours on August 17. (A.2200-01; A.2010-12.) At the start of the session, Head reiterated that most of the bargaining unit had voted down Ingredion's offer, and he suggested that Ingredion present its proposals in the form of the expiring agreement. (A.2200; A.1734.) Meadows replied that Ingredion would take a hard look at the issues and prepare a proposal. (A.2201; A.1735.) Head emphasized that the Union was willing to move on substantive issues and reiterated that the parties needed a better process for negotiating over proposals. (A.2201; A.2011-12.)

On August 18, the parties met for nearly eight hours. (A.2201-02; A.2012-16.) The meeting began with Meadows declaring that he had reviewed the Union's earlier proposals and that the parties were at impasse. (A.2201; A.1736.) Meadows then presented the Union with a newly revised offer labeled "last, best, and final offer." (A.2201; A.272-310.) After a caucus, the Union presented its own economic and non-economic proposals. (A.2201; A.325-38.) Meadows stated that he would consider particular proposals that the Union wanted to

address, and that Ingredion was willing to continue making changes based on its last offer. (A.2201-02; A.1737-39.)

G. The Parties Meet in September and the Union Makes Significant Concessions; Ingredion Nonetheless Implements Its Last Contract Offer; Ingredion Later Polls Employees About Changing Their Work Schedules Without Consulting the Union

The parties did not meet again until September 9, and that meeting only lasted three minutes with no substantive discussions. (A.2202; A.1625, 2016-17.)

On September 10, the parties met across twelve hours. (A.2202; A.2017-19.) Meadows stated that he was going to keep an "open mind" about the Union's proposals and that he was potentially willing to modify Ingredion's last, best, and final offer. (A.2202; A.1741.) After a caucus, the Union presented an "offer of settlement" that made concessions on numerous significant issues and withdrew or modified a number of proposals to match Ingredion's offer, such as eliminating the longstanding labor-relations committee, modifying the grievance-arbitration procedure, and eliminating various letters of understanding attached to the expiring agreement. (A.2202; A.340-423.)

On September 11, the parties met briefly and Meadows stated that Ingredion was not interested in the Union's offer of settlement. (A.2202; A.2019-20.) The Union suggested that the parties continue bargaining and proposed additional bargaining dates. (A.2202; A.2020.) The Union reiterated in a September 13 letter

that it did not consider the parties to be at impasse and that it wanted to pursue further bargaining. (A.2202; A.1792.)

On September 14, Ingredion implemented its last, best, and final offer and put into effect significant changes to employees' terms of employment. (A.2202; A.272-308, 2020.) In October, subsequent to the implementation of its last offer, Ingredion polled maintenance employees about switching to a combination of eight-hour and twelve-hour shifts. (A.2218-19; A.1798-1805, 2035-37.)

H. The Union Files Charges with the Board; an Administrative Law Judge Issues a Recommended Decision

The Union filed an unfair-labor-practice charge with the Board on September 24, and an amended charge on December 29, alleging that Ingredion violated the Act through its bargaining-related conduct. (A.2190; A.1630-31.) The Board's General Counsel issued an unfair-labor-practice complaint in January 2016. (A.2190; A.1632-44.) On April 16, 2016, the Board's General Counsel amended the complaint to allege several additional violations. (A.2190; A.1659-62.) An administrative law judge held an evidentiary hearing over six days between April 18 and April 28, 2016. (A.2190.) The judge issued a recommended decision and order finding that Ingredion violated the Act in numerous ways. (A.2190-2223.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On May 1, 2018, the Board (Members Pearce, McFerran, and Emanuel) affirmed the judge in relevant part and found that Ingredion violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its last offer without reaching a valid bargaining impasse; dealing directly with employees; and unreasonably delaying its provision of relevant information requested by the Union. (A.2187.) The Board found that Ingredion also violated Section 8(a)(1) by threatening employees with job loss if they went on strike; and denigrating the Union by falsely telling employees that the Union was unwilling to negotiate over improved terms. (A.2187.) The Board found it unnecessary to pass on several additional unfair-labor-practice allegations deemed meritorious by the judge, because they would not materially affect the remedy. (A.2186-87 nn.1-3.)

The Board's Order requires Ingredion to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (A.2187-88.) Affirmatively, the Board's Order requires Ingredion to, on request, bargain in good faith with the Union and rescind the changes unilaterally implemented on September 14; put into effect all terms of employment established by the expired agreement and maintain those terms until the parties have bargained to an agreement or a valid impasse; make whole employees for any losses; make

contributions established under the expired agreement; make whole employees discharged, suspended, or denied work as a result of the unilateral implementation; and post a remedial notice. (A.2187-88.) The Board's Order also requires Ingredion to convene employees for a public notice reading by Meadows, or by a Board agent with Meadows and other management officials present. (A.2188.)

SUMMARY OF ARGUMENT

Ingredion committed numerous violations of the Act during bargaining with the Union over a new contract. Substantial evidence supports the Board's findings that, almost immediately after the parties began discussing the prospect of bargaining, Ingredion engaged in a series of unlawful actions undermining the Union, including: dealing directly with bargaining-unit employees about the contents of the next contract, refusing to provide important bargaining-related information to the Union for several months, threatening employees that they might lose their jobs if they went on strike in support of the Union, and falsely informing employees that the Union was unwilling to negotiate over improved benefits. Ingredion has failed to establish that any of these unfair-labor-practice findings are unsupported by record evidence, are procedurally infirm, or are otherwise not entitled to deference.

The primary unfair labor practice at issue is Ingredion's decision to unilaterally implement new terms of employment while still engaged in fruitful

bargaining. This violation turns on the Board's finding that the parties had not yet reached a genuine overall bargaining impasse, which is a complex question of fact uniquely within the Board's expertise and entitled to particular deference by the Court. Here, Ingredion insisted that the parties bargain from scratch over an entirely new contract. Despite the difficulties inherent in such an undertaking, both parties softened their positions on certain issues over time and the parties were making slow progress toward a potential negotiated agreement. Nonetheless, at just the tenth bargaining session, Ingredion declared impasse and presented the Union with a final offer. Only three meetings after that—despite having *continued* to engage in productive bargaining with the Union—Ingredion decided to implement its offer.

The Board's finding that Ingredion failed to show that the parties had reached valid impasse is well supported by the record. The Board first found that, even assuming that Ingredion had been bargaining entirely in good faith, the evidence did not show that the parties were deadlocked, or that they had fully explored all possible paths towards a negotiated agreement. Thus, for example, Ingredion continued to productively bargain with the Union even after having nominally declared "impasse" in mid-August, and the Union demonstrated a genuine willingness to continue bargaining by making significant concessions on important issues just days before Ingredion implemented its last offer.

The Board further found that valid impasse was precluded by Ingredion's failure to approach bargaining in good faith. Although Ingredion changed its positions on certain issues over time and demonstrated the possibility of further progress toward a negotiated agreement, Ingredion also impeded negotiations by approaching bargaining without an open mind toward the Union's proposals, and without fully explaining the reasoning behind its own proposals so as to facilitate informed bargaining. Moreover, Ingredion engaged in a variety of unfair labor practices that undermined the Union's position, and its implemented offer was tainted by the inclusion of a provision allowing Ingredion to cut the Union out of discussions with bargaining-unit employees over changes to their work schedules.

In its brief to the Court, Ingredion does not squarely grapple with the Board's detailed analysis, and instead seeks to substitute its own misleading characterizations of the bargaining and of the record evidence—including self-serving testimony from its chief negotiator, which the Board chose not to fully credit. Ingredion has failed to establish that the Board's findings were not based on substantial evidence, or that they are not entitled to affirmance by the Court. Finally, Ingredion has also failed to establish that a notice-reading remedy was outside the Board's broad remedial discretion.

ARGUMENT

I. Ingredion Violated Section 8(a)(5) and (1) of the Act by Dealing Directly with Bargaining-Unit Employees, Unreasonably Delaying Its Provision of Bargaining-Related Information, Threatening Employees with Job Loss in the Event of a Bargaining-Related Strike, and Denigrating the Union by Misrepresenting Its Bargaining Positions

A. Applicable Principles and Standard of Review

Section 7 of the Act guarantees employees the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. In turn, Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1). Section 8(a)(5) makes it a separate unfair labor practice for an employer to "refuse to bargain collectively with the representative of [its] employees." 29 U.S.C. § 158(a)(5). A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

The Board's findings are conclusive if supported by substantial evidence on the record as a whole, even if the Court might justifiably have reached a different conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). The Court affords a "very high degree" of deference to the Board, and will affirm its

findings unless "no reasonable factfinder" could find as the Board did. *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 165 (D.C. Cir. 2016).

B. Ingredion Violated Section 8(a)(5) and (1) by Dealing Directly with Employees About Changes in the Next Contract

The Board first found that Ingredion violated the Act on April 6 when Meadows, its chief negotiator in the upcoming bargaining, toured the Cedar Rapids facility and, after soliciting bargaining-related proposals from employees, told employees what would or would not be acceptable in the next contract. (A.2194.) An employer violates Section 8(a)(5) and (1) and undermines "the essential principle of collective bargaining" when it circumvents its employees' exclusive representative in order to discuss bargaining-related issues directly with individual employees. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684-85 (1944); *see Allied-Signal, Inc.*, 307 NLRB 752, 753-54 (1992) (observing that an employer's decision to seek input directly from employees "plainly erodes the position of the designated representative").

Shortly after leaving a meeting with local union officials, Meadows approached several employees on the shop floor and began discussing the next contract. (A.1956-57, 1960-62, 1964-65.) Meadows not only solicited individual employees' positions on specific issues, but he also informed employees what they were going to get in the next contract—before negotiations with the Union had even begun. *E.g., Armored Transp., Inc.*, 339 NLRB 374, 376 (2003) (finding

violation where employer presented bargaining proposals to employees prior to union). Moreover, Meadows addressed substantive issues that he knew were of concern to the Union and would likely be raised during bargaining, and yet he told employees that certain terms in the existing contract negotiated by the Union were undesirable or would be going away. *E.g.*, *Obie Pac., Inc.*, 196 NLRB 458, 458-59 (1972) (finding violation where employer discussed existing terms with employees to weaken position of union).

Contrary to Ingredion (Br.36-40), the bargaining-related discussions at issue were unequivocally initiated by Meadows, who introduced himself as Ingredion's chief negotiator for the next contract before *asking* employees what they wanted to see in that contract, and thus Meadows was not simply responding to "employee questions." Nor were the discussions "brief and general" (Br.38), given that Meadows spoke with employees in the ethanol control room for twenty-five minutes about specific policies, and at least one additional employee in a separate conversation involving detailed proposals. To the extent that Meadows had an established "practice" (Br.40) of soliciting input from union-represented employees shortly before commencing bargaining, it would merely suggest that Meadows had a practice of routinely violating the Act.

C. Ingredion Violated Section 8(a)(5) and (1) by Unreasonably Delaying the Provision of Bargaining-Related Information

The Board found that Ingredion violated the Act between early May and the end of July when it unreasonably delayed furnishing important bargaining-related information requested by the Union. (A.2186 n.1, 2207-08.) The duty to bargain in good faith includes the "general obligation to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 565, 568 (1967). Thus, an employer violates Section 8(a)(5) and (1) by failing to reasonably respond to requests for presumptively relevant information, such as information related to wages and benefits. *See Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191-92 (D.C. Cir. 2000). An employer violates the Act not only by refusing to provide requested information, but also by unreasonably delaying its response. *Brewers & Maltsters*, 414 F.3d at 45; *Woodland Clinic*, 331 NLRB 735, 736-37 (2000).

On May 13, after Ingredion provided notice of its intent to terminate the existing agreement and bargain over a new contract, the Union submitted a written information request seeking, among other things: (i) the total cost and cents-per-hour cost and accounting method for each fringe benefit during the previous year; (ii) the cents-per-hour cost for each dollar increase in the defined-benefit pension multiplier; and (iii) the cents-per-hour cost for each 1% increase in the direct-contribution pension plan. (A.2099.) Given Meadows' earlier statements, the

Union had reason to expect that Ingredion would try to radically change such benefits during the upcoming bargaining. Ingredion no longer disputes (Br.46-50) that the requested information was relevant and that it was legally obligated to provide it. Nonetheless, Ingredion inexplicably refused to provide all of the requested information until July 31. (A.1114-15.)

As the Board found, Ingredion offered no contemporaneous explanation to the Union regarding any difficulties it may have experienced in retrieving the specific information at issue. (A.2208.) To the contrary, Ingredion repeatedly indicated, both internally and to the Union, that it did not intend to provide certain information because a pension increase did not fit Ingredion's own bargaining proposals. (A.542, 1796, 1970, 1991.) Although some of the information may have originally been held by a third party, Ingredion failed to show that the information in question was complex to assemble or difficult to retrieve. Given these facts, substantial evidence supports the Board's finding that Ingredion's eleven-week delay in providing the information was unreasonable. *See, e.g.*, *Woodland Clinic*, 331 NLRB at 737 (finding seven-week delay in providing information until shortly before declaring impasse to be unlawful); *Bundy Corp.*, 292 NLRB 671, 671-72 (1989) (finding ten-week delay in providing benefits-related information during bargaining to be unlawful).

Ingredion attempts (Br.46-50) to obfuscate its unlawful conduct by focusing on ancillary information requested by the Union or provided by Ingredion, rather than the three specific items that are the subjects of the Board's unfair-labor-practice finding. The fact that Ingredion selectively complied with its legal obligations and timely provided a "substantial amount" (Br.47) of other information is immaterial. As a result, much of the testimony cited by Ingredion (Br.47-50) regarding its overall efforts is simply irrelevant, and, moreover, Ingredion misleadingly cites testimony dealing with entirely separate information requests to falsely imply that Meadows told the Union it would take "several months" to retrieve the three items at issue.

D. Ingredion Violated Section 8(a)(1) by Threatening Employees That They Would Lose Their Jobs If They Went Out on Strike

The Board next found that Ingredion violated the Act in July when its facility manager, David Vislisel, addressed the possibility of a strike and warned employees to "think long and hard about walking out on these people," because Ingredion had "deep pockets" and many other facilities making the same product. (A.2206; A.1957-58.) Vislisel further warned that employees might "not get back in the door" if they ever went out on strike. (A.2206; A.1957-58.) An employer violates Section 8(a)(1) by coercively threatening its employees that they would risk unconditional job loss in the event of a strike. *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 360-61 (D.C. Cir. 2016); *Baddour, Inc.*, 303 NLRB

275, 275 (1991). Substantial evidence supports the Board's finding that Vislisel's remarks, which came from an upper-level manager at the facility, threatened employees that if they went on strike in support of the Union's position in the ongoing bargaining then they might lose their jobs.

Contrary to Ingredion (Br.45-46), Vislisel's comments were not mere predictions as to probable economic consequences "beyond [Ingredion's] control," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Instead, Ingredion's manager relayed a straightforward threat of reprisal to be taken "solely on [Ingredion's] own volition," *id.* at 619, which included the coercive implication that Ingredion might respond to a strike by shifting production to its other facilities and eliminating jobs at the newly acquired Cedar Rapids facility. As has long been recognized, employees are "particularly sensitive" to rumors of plant closings or job loss, and reasonably "take such hints as coercive threats rather than honest forecasts." *Id.* at 619-20; *e.g.*, *Care One*, 832 F.3d at 361 (reiterating that Court would not second-guess Board's reasonable finding as to unlawful coercive effect of employer pamphlet warning that strike could "jeopardize" employees' jobs).

Ingredion's claim that the Board "never addressed" this violation (Br.44) is frivolous. The Board affirmed the administrative law judge's "rulings, findings, and conclusions"—with several enumerated exceptions—and adopted the judge's recommended order as modified. (A.2186.) The Board's Order expressly includes

the finding that Ingredion unlawfully "threaten[ed] employees that they might lose their jobs if they went on strike." (A.2187, 2189.) It is a routine principle of agency procedure that the affirmed findings of an administrative law judge become the findings of the Board, whether or not the Board itself provides additional analysis. *E.g.*, *StaffCo of Brooklyn, LLC v. NLRB*, 888 F.3d 1297, 1304 (D.C. Cir. 2018).

Equally meritless are Ingredion's attempts (Br.44-46, 50-53) to avoid liability by claiming that the Board's finding was procedurally barred, or that it violated Ingredion's due process rights. Under Section 10(b) of the Act, the allegations in an unfair-labor-practice complaint must be based on charges filed within six months of the events in question or "closely related" to timely filed charges. *See* 29 U.S.C. § 160(b); *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944 (D.C. Cir. 1999). Here, both the September 2015 original charge and December 2015 amended charge specifically alleged that Ingredion had threatened employees with replacement. (A.1630-31.) Thus, the allegation in the amended complaint that Vislisel threatened employees in July 2015 was encompassed by a timely filed charge. (A.2190.) Ingredion has likewise failed to establish a due process violation or to show the requisite prejudice where it received notice of the amendment before the hearing had opened, and where the issue was fully litigated during the hearing. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C.

Cir. 1993). Ingredion cross-examined the employee testifying about Vislisel's remarks and did not seek to recall him before the hearing closed ten days later, and it subsequently called Vislisel as a defense witness. (A.2206.) *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 122-23 (D.C. Cir. 2001) (noting lack of prejudice where employer "had a full opportunity to cross-examine the General Counsel's witness about the circumstances surrounding [alleged] threats").

E. Ingredion Violated Section 8(a)(1) by Denigrating the Union to Employees and Falsely Suggesting That the Union Was Unwilling to Negotiate Over Improved Benefits

The Board found that Ingredion again violated the Act in July when its operations manager, David Roseberry, contacted employees at Meadows' direction and denigrated the Union by falsely portraying the Union's conduct in the ongoing bargaining. (A.2186 n.1, 2205-06.) An employer violates Section 8(a)(1) by suggesting to employees that their chosen bargaining representative "stands as an impediment to an increase in wages or benefits." *Faro Screen Process, Inc.*, 362 NLRB No. 84, 2015 WL 1956203, at *2 (Apr. 30, 2015). Thus, for example, an employer unlawfully denigrates its employees' union when it misrepresents the union's bargaining positions and blames the union for preventing employees from receiving benefits. *Miller Waste Mills, Inc.*, 334 NLRB 466, 467 (2001), *enforced*, 315 F.3d 951 (8th Cir. 2003); *see, e.g.*, *Am. Meat Packing Corp.*, 301 NLRB 835, 839 (1991) (finding that employers violate the Act by misrepresenting a union's

bargaining position and creating "the impression that the employer rather than the union is the true protector of the employees' interests").

In mid-July, Meadows instructed Roseberry to talk to senior employees who had expressed interest in retiring. (A.2041-42, 2045.) After asking another manager about retirement benefits, two employees were separately approached by Roseberry and informed that they should wait to retire because Ingredion was seeking better contractual terms. (A.2041-42, 2044-45.) Roseberry told one employee not to "let a few people in the union body" affect his retirement decision. (A.2042.) Roseberry told the other employee that he needed to convince the Union "to go in an negotiate" regarding the employer's more generous terms, and that he needed to "call [his union representatives] and have them get a hold of the company and start negotiating." (A.2045.) Because of these remarks, employees began discussing whether the Union was telling them everything about the ongoing bargaining, and whether Ingredion had "a lot to give" employees that the Union was not negotiating over. (A.2045.) Substantial evidence thus supports the Board's finding that Ingredion denigrated the Union by falsely suggesting that the Union was unwilling to negotiate over improved retirement benefits or other terms. *See, e.g.*, *Nat'l Med. Assocs., Inc.*, 318 NLRB 1020, 1030-31 (1995) (finding unlawful denigration where employer drove wedge between union and employees by posting letter suggesting that union prevented wage increase).

In its opening brief (Br.42-44), Ingredion ignores parts of the credited testimony relied upon by the Board, such as one employee's recollection that Roseberry told him to try to convince the Union to "start" negotiating over the terms offered by Ingredion (A.2045). Nor was Roseberry merely expressing a negative "opinion" (Br.42) by making materially false statements about the Union being unwilling to negotiate. *See, e.g.*, *Gissel Packing*, 395 U.S. at 618 (distinguishing statements of opinion from unlawful statements designed to "mislead" employees); *cf. Children's Ctr. for Behavioral Dev.*, 347 NLRB 35, 35-36 (2006) (finding statements that union was costing employer money to be lawful where they were not materially false and did not accuse union of harming employees directly).

Ingredion is also wrong to claim that the unfair-labor-practice complaint was defective (Br.43) or that its due process rights were violated (Br.50-51) by the Board finding that Roseberry's comments were unlawful. The complaint clearly alleged that Roseberry violated Section 8(a)(1) and unlawfully denigrated the Union by his comments to employees about retirement benefits. (A.1634-35, 1640, 1662.) The Board's General Counsel does not need to plead the exact contents of testimony that will be elicited at the hearing, and, in any event, here the unfair-labor-practice finding was closely connected to the original complaint, Ingredion received fair notice of the unlawful-denigration theory, and the issue was

fully litigated. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1199-1200 (D.C. Cir. 2003); *Davis Supermarkets*, 2 F.3d at 1169.

F. Ingredion Violated Section 8(a)(5) and (1) by Dealing Directly with Employees About Changes to Their Work Schedules

Although occurring after Ingredion unilaterally implemented its last offer and thus not affecting the Board's analysis regarding the lack of impasse, *infra* pp. 49-51, the Board found that Ingredion separately violated the Act in October by directly polling maintenance employees about changing to a combination of eight-hour and twelve-hour shifts. (A.2218-19.) An employer violates Section 8(a)(5) and (1) when it circumvents its employees' designated bargaining representative and polls employees directly about changes to their working conditions. *Harris-Teeter Super Mkts., Inc.*, 293 NLRB 743, 744-45 (1989) (finding unlawful direct dealing where employer polled employees about switching from five-day to four-day workweek), *enforced*, 905 F.2d 1530 (4th Cir. 1990). Substantial evidence supports the Board's finding here: it is undisputed that Ingredion polled employees about changing their schedules without first consulting the Union, and, as the Board found, Ingredion's ability to do so was "never sanctioned by the union representing the employees." (A.2219.)

Once again, Ingredion's claim that the Board did not address this violation (Br.40-41) is without merit. The Board affirmed the administrative law judge's findings, except where it specified otherwise, and conformed its Order to the

standard remedial language for unlawful direct dealing concerning "wages, hours and working conditions." (A.2186-87.) In this case, that generic language encompassed two separate instances of unlawful direct dealing.

Moreover, contrary to its claims (Br.41), Ingredion violated the Act in this respect regardless of whether the parties had reached valid impasse. Although an employer is entitled to implement certain changes following impasse, "the existence of impasse does not permit an employer to cease recognizing the union as the employees' exclusive representative" or to implement a provision allowing it to deal directly with employees. *Inland Tugs v. NLRB*, 918 F.2d 1299, 1310 (7th Cir. 1990); *see Hotel Bel-Air v. NLRB*, 637 F. App'x 4 (D.C. Cir. 2016). The lone case cited by Ingredion (Br.41) is inapposite, because there, unlike here, the employer's right to poll employees had been sanctioned in a collective-bargaining agreement executed by the employees' union. *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005).

II. Ingredion Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing Its Last Offer Without Having Reached a Valid Impasse in Bargaining with the Union

A. Applicable Principles and Standard of Review

An employer violates Section 8(a)(5) and (1) of the Act by making changes to union-represented employees' terms and conditions of employment without first reaching final agreement or bargaining to valid impasse. *Litton Fin. Printing Div.*

v. NLRB, 501 U.S. 190, 198 (1991); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). Genuine impasse exists only when "good-faith negotiations have exhausted the prospects of concluding an agreement," and there is "no realistic possibility" that continued bargaining would be fruitful. *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012). Overall impasse has not been reached unless there has been a legitimate breakdown "in the entire negotiations," as opposed to impasse on one or more discrete issues. *Wayneview Care*, 664 F.3d at 349-50. The existence of a valid bargaining impasse is an affirmative defense, and thus the burden of proving impasse rests with the party asserting it. *Monmouth Care*, 672 F.3d at 1089.

The Board evaluates impasse based on its "accumulated expertise in the area," and it does not have a "fixed definition" of impasse "which can be applied mechanically to all factual situations." *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991). The Board considers a variety of factors to determine whether the parties had, in fact, reached valid impasse, including: the parties' bargaining history, the good faith of the parties during the negotiations, the length of the negotiations, the importance of the issues as to which there was disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Monmouth Care*, 672 F.3d at 1088-89 (citing *Taft Broad. Co.*,

163 NLRB 475, 478 (1967), *affirmed sub nom. Am. Fed. of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968)).

The Court's review is "particularly" limited with respect to the Board's findings as to the existence of a valid bargaining impasse, which is a question of fact. *Monmouth Care*, 672 F.3d at 1089. The Court has consistently observed that, "in the whole complex of industrial relations," few issues are "*less* suited" to judicial appraisal than the evaluation of a bargaining impasse, or "*better* suited to the expert experience of a board which deals constantly with such problems." *Wayneview Care*, 664 F.3d at 348 (emphases added); *e.g.*, *Dallas Gen. Drivers, Warehousemen & Helpers, Local Union No. 745 v. NLRB*, 355 F.2d 842, 844-45 (D.C. Cir. 1966); *accord Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990).

B. The Parties Had Not Yet Exhausted the Possibility of Reaching an Agreement, and the Board Reasonably Found That Ingredion Failed to Prove Further Negotiations Would Have Been Futile

The Board found that the parties had not yet fully explored all possible paths toward a negotiated agreement when Ingredion declared impasse or when it implemented its final offer, and that Ingredion therefore failed to establish the existence of valid impasse. (A.2186-87.) Thus, even setting aside the indicia of a lack of good faith discussed further below, *infra* pp. 43-54, the Board found that Ingredion violated the Act by unilaterally implementing its final offer.

1. The parties lacked an established bargaining relationship and their negotiations lasted a short period of time given that Ingredion sought an entirely new agreement

The first and third traditional factors for evaluating impasse concern "the parties' bargaining history" and "the length of the negotiations." *Monmouth Care*, 672 F.3d at 1088-19. The Board has long recognized that bargaining presents "special problems" when the parties do not have an established bargaining relationship and have not executed previous contracts together. *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71-72 (1965). A reasonable period of bargaining in such situations will tend to be longer, because "difficulties [are] often encountered in hammering out fundamental procedures, rights, wage scales, and benefit plans in the absence of previously established practices." *Lee Lumber & Bldg. Material Corp.*, 334 NLRB 399, 403 (2001), *enforced*, 310 F.3d 209 (D.C. Cir. 2002). The Board also considers whether a party is seeking a "wide range of drastic cuts" such that good-faith negotiations would reasonably tend to be "difficult and potentially protracted." *Newcor Bay City Div.*, 345 NLRB 1229, 1239 (2005).

As the Board noted, Ingredion and the Union had no prior bargaining history. (A.2214.) Ingredion acquired Penford Products and the Cedar Rapids facility in March, and its chief negotiator, Meadows, met with local union officials for the first time in April. When actual bargaining commenced in early June, Meadows made clear that management from the Cedar Rapids facility would have

very little input on the negotiations. (A.1713, 1750, 1991.) As the negotiations progressed, the Union repeatedly commented that the parties needed to establish basic procedures for bargaining rather than simply stating that they were not interested in each other's proposals. (A.2011-12.) Moreover, as the Board emphasized, the parties were effectively bargaining from scratch over an entirely new contract due to Ingredion's insistence on renegotiating every single term in the expiring agreement. (A.2214.)

Despite the arduous task of adjusting to a new bargaining relationship while negotiating over an entirely new replacement agreement, there were only ten bargaining sessions between June 1, when the parties first met briefly to exchange initial proposals, and August 18, when Ingredion declared impasse. As the Board found, this was a "relatively low number of meetings" given the scope of the bargaining. (A.2214.) Several of these bargaining sessions lasted only a few hours, including caucuses. There was also only one bargaining session between the date on which the Union finally received important benefits-related information and Ingredion's declaration of impasse. After declaring impasse, there were only three additional meetings—including one that lasted three minutes—before Ingredion unilaterally implemented its last offer.

Ingredion's anomalous claim (Br.12-13) that there were "dozens" of bargaining sessions—evidently based on counting multiple "sessions" per day—is

false. Meanwhile, all but one of the cases cited by Ingredion (Br.13) involved parties that had an established bargaining relationship and were bargaining over discrete changes to a predecessor agreement. Although *Erie Brush* involved first-contract negotiations and only eight formal bargaining sessions, in that case the parties were engaged in bargaining for over ten months before impasse, and they had been able to reach agreement "on all noneconomic issues except two," which were the subjects of the impasse. *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 19, 21 (D.C. Cir. 2012). In any event, the limited number of bargaining sessions that took place here was plainly insufficient for the parties to reach agreement on replacing every single term of an expiring contract rooted in seventy years of bargaining history. The Union had proposed beginning negotiations earlier than June (A.1772, 1987), but Ingredion refused that request and then proceeded to prematurely declare impasse shortly after the existing contract expired.

2. The parties had not yet meaningfully discussed important issues and they were continuing to show movement

The fourth traditional impasse factor is "the importance of the issue or issues as to which there was disagreement." *Monmouth Care*, 672 F.3d at 1089. The parties generally will not have reached valid impasse if important issues were only discussed late in the course of bargaining. *Atlas Refinery, Inc.*, 354 NLRB 1056, 1071 (2010), *incorporated by reference*, 357 NLRB 1798 (2011), *enforced*, 620 F. App'x 99 (3d Cir. 2015); *cf. Sanders House v. NLRB*, 719 F.2d 683, 687 (3d

Cir. 1983) (noting that "movement on one important issue may support a finding that an impasse did not exist even though other key issues remain unresolved," because "a willingness to move toward an agreement on an important issue in dispute might trigger other concessions on related questions").

As the Board explained, when Ingredion declared impasse the parties had not yet meaningfully negotiated over key issues affecting employees' terms and conditions of employment. (A.2214.) For example, Ingredion had only made one wage proposal prior to declaring impasse, and the Union had not yet presented any specific wage proposal in advance of the bargaining session at which impasse was nominally declared. Ingredion raised the issue of wages for the first time on July 28 and proposed a permanent two-tier wage system with little supporting explanation. Only three bargaining sessions after that Ingredion presented its "last, best, and final offer" while declaring impasse. There was likewise little opportunity for the parties to discuss pension and healthcare benefits. The Union did not present a proposal regarding pension benefits and the parties did not discuss pension or healthcare benefits until July 31. The Union did not even receive all of the information it requested regarding pension and healthcare benefits until that same bargaining session. *See, e.g.*, *Atlas Refinery*, 354 NLRB at 1071 (finding no impasse where "important economic issues were only discussed during the last three sessions").

Although the parties disagreed over the format of their contract proposals—with the Union basing its proposals on the expiring agreement, and Ingredion basing its proposals on an entirely new agreement—the evidence supports the Board's finding that this was not an impediment to further bargaining. (A.2214-15.) To the contrary, both parties repeatedly showed movement on substantive terms and responded to proposals from the other party. Thus, for example, the Union incorporated language from Ingredion's initial offer in its June 29 non-economic proposals with respect to in-house space for union elections, calculating seniority, and paid time off. (A.318-20 art.II, art.V, art.VIII.) Ingredion did the same thing in its July 28 and July 29 offers by adding language from the expiring agreement regarding retiree health insurance and paid leave. (A.110 art.XX, A.135-38 art.XI.) The Union made numerous major concessions in its September 10 offer of settlement, and incorporated language from Ingredion on issues such as dues checkoff, the entire grievance-arbitration procedure, and retiree health insurance. (A.342-43 art.I, A.343-46 art.II, A.383-86 art.X.) In general, both parties exchanged summaries of their positions relative to the format of the other side's proposals (A.1782-85, 1787), and bargaining was never impeded as a result of the format of the proposals alone.

Based on the foregoing facts, the Board reasonably inferred that further bargaining over substantive terms "may very well have resulted in the parties

compromising with respect to the format and language of a new agreement." (A.2215.) Moreover, even assuming, arguendo, that the parties would *not* have reached agreement on the form of the contract, the relevant inquiry in the present case is whether Ingredion's declaration of impasse was unlawfully premature. The parties clearly still had room to negotiate over wages, benefits, and other important issues that might have affected the contents of Ingredion's implemented terms or led to an agreement. Ingredion failed to meet its burden of proving that there was "no realistic possibility" that continued bargaining would have been fruitful. *Monmouth Care*, 672 F.3d at 1088.

Given the concrete evidence that the parties showed movement on substantive terms and incorporated each other's proposals, the Court should also disregard Ingredion's suggestion (Br.21) that the format of the proposals was a "critical issue" preventing any further progress. There is a special doctrine in Board law under which a single issue may be of such importance that "there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *CalMat Co.*, 331 NLRB 1084, 1097 (2000) (discussing three-factor test). That doctrine is an exception to the general rule. *Wayneview Care*, 664 F.3d at 349-50. Ingredion does not cite any case in which the format of parties' proposals at the bargaining table was itself deemed a "critical issue," and Ingredion fails to explain why or how such disagreement would have prevented

further negotiations over substantive terms. Indeed, the format of the contract proposals did *not* prevent further bargaining over substantive terms in this case, and it was far from "rank speculation" (Br.20) for the Board to infer that continued bargaining may have been fruitful. *See Sanders House*, 719 F.2d at 687; *Hayward Dodge, Inc.*, 292 NLRB 434, 468 (1989) (explaining that there is "reason to believe that further bargaining might produce additional movement" after a party makes nontrivial concessions, even if a "wide gap between the parties remains").

3. The contemporaneous actions of the parties demonstrated their understanding that they were not deadlocked

In order to find impasse, the Board also traditionally considers "the contemporaneous understanding of the parties as to the state of negotiations." *Monmouth Care*, 672 F.3d at 1089. Establishing genuine impasse requires a showing that *both* parties were unwilling to compromise further, such that continued bargaining would have been futile. *Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585, 585-86 (1999), *enforced*, 236 F.3d 187 (4th Cir. 2000). Where one or both parties demonstrated a sincere willingness to continue making concessions or to consider alternative proposals, then there was no valid impasse. *Teamsters*, 924 F.2d at 1084 (noting that either party's willingness "to move further toward an agreement" is of "central importance" to the impasse inquiry); *e.g.*, *Prime Healthcare Centinela, LLC*, 363 NLRB No. 44, 2015 WL 7568337, at *2 (Nov. 24, 2015).

The Board found that the Union remained open to further bargaining prior to Ingredion's premature declaration of impasse. (A.2215.) On August 17, just one day before Ingredion declared impasse, the Union expressly clarified that it was still willing to move on substantive issues. At the following bargaining session, the Union presented a revised counteroffer that adopted language from Ingredion's proposed agreement and compromised on numerous issues. During the same session, the Union made compromises on wages and related provisions. The Union's willingness to continue negotiating was further confirmed by its September 10 "offer of settlement," in which it acquiesced on a number of significant proposals contained in Ingredion's last offer. The Union agreed to drop many of the improved terms that it had been seeking relative to the expiring agreement, including reinstituting cost-of-living adjustments, increasing the defined-benefit pensions multiplier, extending medical insurance and death benefits, establishing a full-time paid union officer, and adding a variety of other employee benefits. (A.1742.)[3] The Union also agreed to eliminate the contractual joint labor-relations committee and modify the longstanding grievance procedure by adopting Ingredion's proposed language, to soften its demands as to pension and insurance benefits, and to eliminate a raft of letters of understandings attached

[3] The numerous proposals that the Union dropped are indicated by check marks on the list of initial proposals in the record at A.312-16.

to the expiring agreement. (A.343-46 art.II, A.383-86 art.X, A.390-423 art.XIII.) Just before Ingredion implemented its final offer, the Union again forcefully reiterated in a September 13 letter that it did not consider the parties to be at impasse and that it wanted to pursue further bargaining. (A.1792.)

Although the Union's demonstrated willingness to continue compromising and moving toward an agreement is by itself sufficient to preclude genuine impasse, *Teamsters*, 924 F.2d at 1084, the Board found that Ingredion's conduct also demonstrated that the parties never reached impasse. (A.2186-87.) Meadows declared that the parties were at impasse at the beginning of the parties' August 18 bargaining session. Despite Meadows having invoked the word "impasse," Ingredion then presented the Union with a revised proposal changing numerous provisions, and the parties resumed bargaining. Moreover, Ingredion subsequently *continued* to negotiate with the Union over the next four weeks while demanding and receiving further concessions on substantive issues. In a September 11 letter to employees, Ingredion indicated that the parties would continue without a contract "until such time as the Union agrees to the terms contained in [Ingredion's] last, best, and final offer." (A.1789-90.) Given these facts, the Board reasonably found that the parties were not truly deadlocked when Ingredion implemented its offer, and that they had not yet fully explored all paths toward reaching a negotiated agreement. (A.2186-87.)

Tellingly, Ingredion largely ignores the major concessions that the Union continued to make prior to implementation, and it instead falsely asserts (Br.15) that the only proposal that the Union withdrew was a request for "tea and stirrer sticks." Ingredion also focuses (Br.22-23) on isolated statements that in no way negated the Union's demonstrated desire to continue making progress toward a negotiated agreement. In *Mike-Sell's Potato Chip Co. v. NLRB*, the Court recognized that valid impasse does not "require" that the union consent to impasse or that both parties agree about the state of negotiations. 807 F.3d 318, 323 (D.C. Cir. 2015) (quoting *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1117 (D.C. Cir. 2001)). Thus, as the Court has explained, it is not enough for a party to make "vague request[s]" about further bargaining or to simply assert that it remains flexible in an attempt to stave off impasse. *TruServ*, 254 F.3d at 1117. Here, however, the Union clearly demonstrated by its actual conduct and revised offers that it was "ready to move," *id.*, on significant issues including wages, benefits, and the grievance procedure. That concrete movement was sufficient to preclude any claim of impasse. *Teamsters*, 924 F.2d at 1084.

The Court lacks jurisdiction to entertain Ingredion's new argument that the Board "improperly relied on post-impasse conduct" when it took into account Ingredion's actions in early September to find that those actions belied any claim that Ingredion understood negotiations to be deadlocked. (Br.27, 34-35.) Such

argument was never presented to the Board. 29 U.S.C. § 160(e); *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 543, 550-51 (D.C. Cir. 2016). In any event, Ingredion misreads this Court's precedent by claiming that its actions immediately after nominally declaring impasse on August 18 cannot be considered in evaluating whether the declaration of impasse was legitimate. The Court has merely suggested that the Board cannot rely exclusively on post-impasse conduct if the balance of the evidence suggests that the parties had reached a genuine deadlock. *Erie Brush*, 700 F.3d at 22 (citing *Laurel Bay Health & Rehab. Ctr. v. NLRB*, 666 F.3d 1365, 1375 (D.C. Cir. 2012)); *see Teamsters*, 924 F.2d at 1084 n.6. The expansive reading of precedent urged by Ingredion would illogically and impermissibly bar the Board from ever considering a broad category of evidence that might show that a party's initial invocation of the word "impasse" was not in fact genuine. Moreover, the ultimate question in the present case is whether Ingredion's otherwise unlawful implementation of its last offer on September 14 was justified by the existence of impasse "at the time of the unilateral action." *Francis J. Fisher, Inc.*, 289 NLRB 815, 815 n.1 (1987).

C. Ingredion's Bargaining Conduct Supports the Board's Finding That the Parties Had Not Reached Valid Impasse

As explained above, the Board primarily found that there was no valid impasse because the parties had not yet exhausted the possibility of reaching agreement. Thus, "even assuming that both parties had been bargaining in good

faith," Ingredion's premature declaration of impasse and implementation of its last offer violated Section 8(a)(5) and (1). (A.2186-87.) However, the Board also found, in further support of its finding that genuine impasse had not occurred, that Ingredion demonstrated a lack of good faith and that valid impasse was otherwise precluded by Ingredion's conduct. (A.2214-16.)

1. Ingredion did not approach the bargaining in good faith

The remaining traditional factor in evaluating impasse is "the good faith of the parties during the negotiations." *Monmouth Care*, 672 F.3d at 1088-89. The Board found that Ingredion's overall bargaining conduct in the present case "demonstrated a lack of good faith." (A.2208-11, 2214.)[4] A lack of good faith can be indicated by a party entering bargaining with a "closed mind" or a desire to only reach final agreement on its own terms. *Hardesty Co.*, 336 NLRB 258, 259-60 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002). Another indication is a party's failure to adequately explain its bargaining proposals—particularly where significant changes are proposed—which impairs the ability of the other party to respond and frustrates informed bargaining. *Sparks Nugget, Inc.*, 298 NLRB 524, 527 (1990), *enforced in relevant part*, 968 F.2d 991 (9th Cir. 1992).

[4] The Board found it unnecessary to pass on whether Ingredion's conduct during bargaining constituted an independent violation of the Act, as such a finding would not materially affect the remedy. (A.2187 n.3.)

The Board found that, even before bargaining had begun, and thus before Ingredion had heard the Union's position on any issue, Ingredion's conduct indicated an unwillingness to seriously consider proposals from the Union. (A.2209.) When first meeting with the local union officers on April 6, Meadows dismissively indicated that existing pension and healthcare benefits would be going away. On the same day, Meadows directly spoke with employees about bargaining and made clear that Ingredion had already decided that the next contract would, inter alia, only include a wage increase up to 2.5%, that the existing health insurance would be replaced by Ingredion's plan, and that there would be no increase in the pension multiplier. In early June, Meadows told the Union that he was "basically giving [the Union] a new contract" with Ingredion's proposed agreement, and that he was "fine with going to impasse." (A.1713, 1750-51, 1817, 1991, 2098.)

Once bargaining began, Ingredion continued to demonstrate that it was not approaching negotiations in good faith. At the June 30 bargaining session, after only two previous sessions lasting a total of six hours, Meadows suggested that Ingredion was preparing to give the Union a last, best, and final offer. (A.2209-10.) More specifically, Meadows offered the Union a second proposed agreement (A.40-77) and stated that Ingredion's contract "was [its] proposal" and that it "[was] not coming off it" (A.1718, 1753, 1994). Meadows then stated that

Ingredion "was willing to put together [a last, best, and final offer]" and that the Union "would see work or activity going on in the plant directly related to that." (A.1719, 1753, 1976, 1994.)

The Board also emphasized that throughout bargaining Ingredion refused to provide the Union with legitimate explanations for its bargaining positions, many of which sought major cuts to benefits under the expiring contract. (A.2209-10.) For example, Ingredion eventually proposed a permanent two-tier wage system that would dramatically alter terms of employment at the facility, with only a vague assertion that the change was necessary for an overall "economic adjustment." (A.1902, 2049-50.) In general, Meadows claimed that the expiring contract's terms were unacceptable because they would not allow Ingredion to "grow," without articulating any basis for that claim in response to the Union's questions. (A.1996, 1720.) Indeed, Ingredion never adequately explained why it insisted on bargaining over an entirely new contract, despite the expiring contract being the product of nearly seventy years of labor-management relations at the Cedar Rapids facility. (*E.g.*, A.1713, 1750, 1991, 1994, 2002-03, 2007-08, 2011.)

Ingredion was similarly evasive in rejecting many of the Union's specific counterproposals. At the June 29 bargaining session, for example, Meadows went through all of the Union's proposals in less than ten minutes, summarily indicating that Ingredion was "not interested" in the majority of them and that other proposals

were inconsistent with Ingredion's proposed agreement. (*E.g.*, A.1715-17, 1777-80, 1979-80, 1992-93, 2048.) Meadows did not explain the basis for Ingredion's disagreement, and he did not give the Union room to negotiate or a basis for adjusting its proposals through the normal give-and-take of bargaining. Meadows also stated that he was not going to provide pension-related information because the pension plan was not part of Ingredion's proposed agreement. As further evidence of Ingredion's intransigent approach to bargaining, the Board observed that after unfair-labor-practice charges were filed in the present case, Meadows told the Union that even if the Board ruled against Ingredion, "he would come back to the table and do the exact same thing and get to impasse." (A.2209; A.2021.)

Thus, substantial evidence supports the Board's findings that Ingredion did not approach the bargaining in good faith, which impaired the parties' ability to fully explore all possible paths toward a negotiated agreement prior to Ingredion's premature implementation of its last offer, and which reinforces the Board's ultimate finding that the parties had not yet reached genuine impasse. (A.2214.)

Ingredion ignores much of the above analysis (Br.25-31) and instead responds to a strawman by focusing on one aspect of the bargaining—its decision to bargain from entirely new terms—and then attempting to characterize the "tenor" of the Board's analysis as involving a substantive disagreement with Ingredion's bargaining position. To the contrary, the Board did not pass judgment

on the merits of either party's bargaining positions, but instead found a lack of good faith based on Ingredion's failure to *explain* to the Union the basis for the radical changes it proposed. Ingredion's assertion that it "explained from the get-go" (Br.29) the reasons for bargaining from scratch is incorrect—the only justification ever offered to the Union during bargaining was a vague contention that Ingredion needed to "grow," with no further explanation when the Union raised questions. It was not until the unfair-labor-practice hearing that Meadows indicated, once again vaguely and cursorily, that an entirely new agreement was necessary to maintain "consistency." (A.2057.) As the Board found, even this post hoc explanation did not provide "meaningful" reasoning in support of the significant changes at issue. (A.2210.) *Sparks Nugget*, 298 NLRB at 527 (finding lack of good faith where only explanations are "conclusory statements that this is what the party wants"). In general, Ingredion's brief relies heavily on self-serving and largely irrelevant testimony from Meadows (*e.g.*, Br.16-17), who the Board did not find to be a credible witness (A.2194-95). *Monmouth Care*, 672 F.3d at 1091-92 (noting that Court will not reverse the Board's witness credibility determinations unless "hopelessly incredible" or "patently unsupportable").

2. The declaration of impasse was invalid due to the presence of contemporaneous unfair labor practices

The Board also noted that the bargaining took place alongside numerous unremedied violations of the Act. (A.2214.) The Board has recognized that impasse may be invalid due to "serious unremedied unfair labor practices that affect[ed] the negotiations." *Great S. Fire Prot., Inc.*, 325 NLRB 9, 9 n.1 (1997). Contemporaneous unfair labor practices can preclude a valid impasse by unduly increasing "friction at the bargaining table." *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 139 (D.C. Cir. 1999). In the present case, the Board found that Ingredion's numerous unremedied unfair labor practices contributed to its overall lack of good faith in the bargaining, thereby further reinforcing the finding that there was no genuine impasse. (A.2213-14.)

As previously discussed, *supra* pp. 19-28, Ingredion undermined the Union by dealing directly with employees about bargaining proposals, threatening employees in order to suppress their willingness to go on strike, and denigrating the Union while misrepresenting its bargaining conduct—unlawful actions which could reasonably be expected to impair the Union's leverage at the bargaining table. *Anderson Enters.*, 329 NLRB 760, 761-64 (1999) (finding no impasse where employer dealt directly with employees over bargaining topics and disparaged union), *enforced*, 2 F. App'x 1 (D.C. Cir. 2001); *cf. NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1186 n.79 (D.C. Cir. 1981) ("Of course, an employer

who purports to bargain in good faith but who is engaged in efforts to denigrate and undermine the union is not fulfilling its obligations under federal labor law.").

Furthermore, during much of the bargaining Ingredion was separately violating Section 8(a)(5) and (1) by refusing to provide important bargaining-related information repeatedly requested by the Union, *supra* pp. 21-23. (A.2214.) Genuine impasse typically will not exist where an employer failed to satisfy its statutory obligations by unlawfully delaying the provision of relevant information going to issues separating the parties. *Castle Hill Health Care Ctr.*, 355 NLRB 1156, 1188-89 (2010); *see E.I. du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1314-16 (D.C. Cir. 2007) (affirming principle that employer's failure to provide relevant information can preclude impasse). Thus, even when an employer ultimately provides all of the requested information, there is no genuine impasse if there was insufficient time between the provision of the information and the employer's declaration of impasse. *Anderson Enters.*, 329 NLRB at 763 & n.14. Here, Ingredion unlawfully delayed providing important information regarding the costs of pension benefits for two and a half months, even as the parties offered significantly divergent proposals on that issue and Ingredion sought to freeze pensions. (A.32 art.XIX, A.302-03 art.XX, A.313.) The Union did not receive all of the requested information until July 31, and did not have time to present a revised offer—which, among other things, dropped its proposal for an increase to

the pension multiplier (A.383 art.X)—until after impasse had already been declared and shortly before Ingredion unilaterally implemented its own terms.

Contrary to Ingredion's implications (Br.30-31), there does not need to be "but for" causation for a party's unremedied unfair labor practices to preclude valid impasse, as long as they affected the bargaining and therefore demonstrated that the party was not fulfilling its bargaining obligations under the Act. *See E.I. du Pont*, 489 F.3d at 1314-15.

3. The declaration of impasse was invalid due to the inclusion of a permissive subject of bargaining in Ingredion's offers

As an additional and independent basis for concluding that Ingredion failed to establish the existence of valid impasse, the Board found that the bargaining was tainted by Ingredion's inclusion of a permissive subject of bargaining in its final offer to the Union. (A.2215-16.) Permissive, or nonmandatory, subjects are those over which a party has no obligation to bargain. *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988). Under Board law, an alleged bargaining impasse is not valid if it was created, even in part, by a party's insistence on bargaining about a permissive subject. *Retlaw Broad. Co.*, 324 NLRB 138, 143 (1997), *enforced*, 172 F.3d 660 (9th Cir. 1999).

Beginning in its July 28 proposed agreement, Ingredion put forward a series of package proposals all containing a provision granting it the authority to switch from an eight-hour to a twelve-hour workday "if at least 65% of [a] classification

votes to go to a 12 hour shift." (A.92 art.X.) No role was contemplated for the Union before such a major change to employees' working conditions would be made, and instead the provision permitted Ingredion to deal directly with bargaining-unit employees to the exclusion of the Union. Contrary to Ingredion (Br.32-33), it is well established that provisions granting employers the discretionary right to directly consult employees about changes to their working conditions constitute permissive subjects of bargaining. *E.g.*, *ServiceNet, Inc.*, 340 NLRB 1245, 1246 (2003) (finding that provision permitting employer to circumvent union and deal directly with employees was permissive); *see Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1224 (D.C. Cir. 1990) (holding that provision granting employer discretion to offer changed benefits to employees would deprive union of "its central statutory role as representative").

After July 28, Ingredion included the twelve-hour-shift voting provision in every one of its package offers. (A.131 art.X, A.171 art.X, A.210 art.XI, A.247-48 art.XI.) On August 18, as one of several counterproposals to Ingredion, the Union sought to maintain language defining the normal workday as eight hours. (A.329 art.III.) During this same bargaining session, Meadows stated that Ingredion was not going to move on any of its proposals and that the parties were at impasse. Ingredion then presented a "last, best, and final offer" containing the voting provision. (A.285 art.XI.) When the parties met in early September, the Union

presented an "offer of settlement" that again implicitly rejected Ingredion's proposal regarding voting on twelve-hour shifts and instead proposed language keeping eight-hour shifts as the employees' normal workday. (A.346 art.III.) In addition, the Union proposed maintaining a letter of understanding specifically requiring Ingredion to consult the Union before introducing "new work schedules." (A.411-12.) Meadows reviewed the Union's settlement offer and stated that Ingredion was not interested in any of the Union's proposals.

Ingredion presented its offers as package proposals and there was no contemporaneous indication that it was willing to entertain an agreement without that provision. To the contrary, Ingredion repeatedly renewed the provision in all of its offers after July 28, and it summarily rejected the Union's counteroffers containing divergent language. Meanwhile, language guaranteeing an eight-hour normal workday was one of the handful of proposals that the Union focused on in its August 18 counteroffer just before the purported impasse (A.329), and even in the Union's initial proposals on June 1, the very first item listed was that all employees should maintain a contractual eight-hour workday (A.312). Substantial evidence thus supports the Board's finding that the voting provision contributed to Ingredion's unlawful declaration of impasse. (A.2215-16.)

Ingredion cites two inapposite court cases (Br.33-34) in which the issue was whether a party's insistence on bargaining "over" a permissive subject was itself

an independent violation of the Act—as opposed to the issue here, which is whether Ingredion's unilateral implementation was unlawful due to the lack of valid impasse. Meanwhile, in *ACF Industries*, the Board merely reaffirmed that the inclusion of a permissive subject must have contributed to the declared impasse in "[some] discernable way" for impasse to be invalidated. 347 NLRB 1040, 1042 (2006). The permissive subject at issue in that case, involving the expiration dates of insurance and pension agreements, did not contribute to the parties' impasse because the union never objected to the modified dates and, in fact, the employer's implemented terms were consistent with the union's own bargaining proposals. *Id.* at 1058-59. The Board was careful to clarify that a party's failure to expressly object to a permissive subject is not determinative in assessing whether that subject's inclusion contributed to impasse. *See id.* at 1042. Here, as noted, the maintenance of a contractual eight-hour workday was important to the Union, the Union implicitly rejected the proposed permissive term on multiple occasions, and Ingredion stated that it was not interested in the Union's counteroffers that excluded the permissive term. There was more than sufficient evidence for the Board to reasonably find that the permissive subject contributed, at least "in part," to the declared impasse. *Retlaw Broad.*, 324 NLRB at 143.

* * *

For all of the foregoing reasons, substantial evidence supports the Board's finding that Ingredion failed to carry its burden of proving that the parties had reached a valid impasse. As a result, Ingredion violated Section 8(a)(5) and (1) when it unilaterally implemented its last offer on September 14.

III. The Board Acted Within Its Broad Discretion in Ordering a Notice-Reading Remedy

Finally, Ingredion raises a perfunctory challenge (Br.53-54) to the notice-reading remedy in the Board's Order. However, such remedy was well within the Board's statutory discretion.

Section 10(c) of the Act grants the Board the power to remedy unfair labor practices by ordering a respondent to "take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). The Board has "broad discretionary" authority to fashion remedies based on its administrative expertise and the "enlightenment gained from experience." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *see Gissel Packing*, 395 U.S. at 612 n.32 (recognizing that the Board "draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts"). Courts must enforce the Board's chosen remedies unless shown to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper*, 379 U.S. at 216.

As the Board has explained, based on its long experience remedying similar violations of the Act, a public notice reading is sometimes necessary as "an effective but moderate way" to provide employees "with some assurance that their rights under the Act will be respected in the future." *Auto Nation, Inc.*, 360 NLRB 1298, 1298 n.2 (2014), *enforced*, 801 F.3d 767 (7th Cir. 2015). This Court has repeatedly affirmed that a public notice reading is an appropriate remedy where, for example, "upper management has been directly involved in multiple violations of the Act." *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 86 (D.C. Cir. 2018) (citing cases); *see, e.g.*, *Auto Nation*, 360 NLRB at 1298-99 & n.2 (ordering notice reading where high-ranking officials were personally involved with unfair labor practices); *McAllister Towing & Transp. Co.*, 341 NLRB 394, 400 (2004) (same), *enforced*, 156 F. App'x 386 (2d Cir. 2005).

In the present case, the unfair labor practices were serious and widespread insofar as they ultimately affected the entire bargaining unit and the Union's status as bargaining representative. Meadows was the director of human resources and chief labor negotiator for the multinational corporation that had recently acquired the Cedar Rapids facility. He was also responsible for many of the unfair labor practices found by the Board, including undermining the status of the Union and engaging in a course of conduct during bargaining that led to the unlawful implementation of a last offer radically changing terms of employment for every

bargaining-unit employee. Other unfair labor practices were committed by upper-level managers at the local facility, including Roseberry and Vislisel, with the latter manager threatening employees with permanent job loss. Based on these facts, the Board reasonably found that a public notice reading is necessary to ameliorate the impact of Ingredion's unlawful conduct, and to ensure that the Board's other remedies are fully effective. (A.2186 n.2, 2221.)

Ingredion's attempt to substitute its own judgement for that of the Board by asserting that a notice posting would be "sufficient" in this case (Br.54), and by attempting to limit notice-reading remedies to parties with a "history" of violating the Act (Br.53), disregards the applicable standard of review. The Court has long recognized that a public notice reading is an appropriate remedy designed to effectuate the policies of the Act, and Ingredion has failed to demonstrate that the inclusion of that remedy here was a "clear abuse of discretion." *Hosp. of Barstow, Inc. v. NLRB*, 897 F.3d 280, 290 (D.C. Cir. 2018). With respect to Ingredion's misleading assertion that the Board's Order requires Meadows' appearance "when he no longer works for [Ingredion]" (Br.54), the Board expressly clarified in a supplemental order that, "[i]f Meadows is no longer available," then Ingredion and

the Board's General Counsel "can negotiate (and if necessary litigate) the best possible notice-reading alternative in compliance [proceedings]" (A.2225 n.4).[5]

[5] Ingredion's challenge (Br.51-52) to the portion of the Board's Order requiring the rescission of disciplinary actions resulting from the unlawful implementation is also without merit. The Board's General Counsel did not "change theories in midstream" on April 21 by merely introducing documentary evidence of post-implementation discipline into the record. The complaint included standard language requesting that the Board direct Ingredion to rescind its unlawfully implemented terms, to make-whole affected employees, and to grant any further appropriate relief. (A.1640.) Requiring employers to rescind resultant discipline is a normal remedy for such violations. *E.g.*, *EIS Brake Parts*, 331 NLRB 1466, 1466 n.2 (2000). Even assuming there was a due process issue, Ingredion cannot establish prejudice where it was able to litigate the issue at the hearing and then fully brief the appropriateness of such a remedy before the Board.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
April 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INGREDION, INC.	)	
d/b/a PENFORD PRODUCTS CO.	)	
Petitioner/Cross-Respondent	)	Nos. 18-1155, 18-1244
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
Respondent/Cross-Petitioner	)	18-CA-160654
	)	18-CA-170682
and	)	
	)	
LOCAL 100G, BAKERY, CONFECTIONERY,	)	
TOBACCO WORKERS & GRAIN MILLERS	)	
INTERNATIONAL UNION, AFL-CIO, CLC	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,895 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
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Dated at Washington, D.C.
this 2nd day of April, 2019

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LOCAL 100G, BAKERY, CONFECTIONERY,	)	
TOBACCO WORKERS & GRAIN MILLERS	)	
INTERNATIONAL UNION, AFL-CIO, CLC	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ David Habenstreit
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Dated at Washington, D.C.
this 2nd day of April, 2019

ADDENDUM

STATUTORY ADDENDUM

Federal Statutes **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. §§ 151 *et seq.*)

29 U.S.C. § 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 158(a)(1)

[Sec. 8. (a) It shall be an unfair labor practice for an employer-] (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

29 U.S.C. § 158(a)(5)

[Sec. 8. (a) It shall be an unfair labor practice for an employer-] (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

29 U.S.C. § 160(a)

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

29 U.S.C. § 160(b)

[Sec. 10.] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code.

29 U.S.C. § 160(c)

[Sec. 10.] (c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

29 U.S.C. § 160(e)

[Sec. 10.] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 U.S.C. § 160(f)

[Sec. 10.] (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Nobody wants Trump to shut down the southern border — Acosta testifies on the Hill — Google requires contractors to pay $15 hourly wage plus benefits
Date: Wednesday, April 3, 2019 10:03:38 AM

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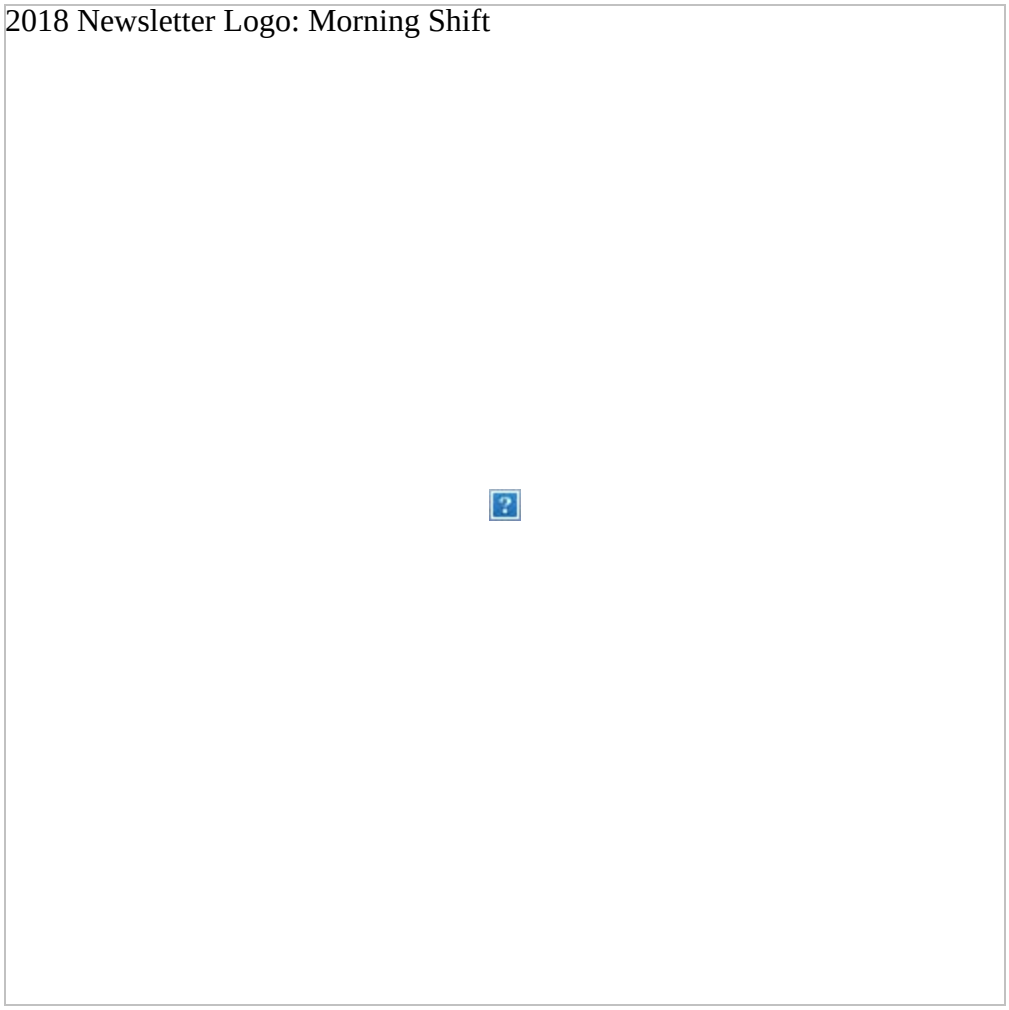

04/03/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

—Everybody's telling Trump that shutting down the southern border could have 'catastrophic' economic consequences. He doesn't seem to care.

— Acosta will likely be quizzed about the Jeffrey Epstein plea deal when he appears today before a House appropriations subcommittee.

— Google said Tuesday that it will require it contractors to pay workers a $15 minimum wage and to give them health and other benefits.

GOOD MORNING! It's Wednesday, April 3, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

NOBODY WANTS TRUMP TO CLOSE THE BORDER: President Donald Trump's senior economic aides, Republican leaders, and the business community are all urging him not to carry out his threat to close the southern border, ostensibly to halt illegal immigration. "Officials frantically spent the day searching for ways to limit the economic impact of shuttering the border," POLITICO's Nancy Cook and Andrew Restuccia report, with one possibility involving "closing the border to cars but allowing commercial trucks to continue to pass through." No final decision has been made.

Senate Majority Leader Mitch McConnell said Tuesday that closing the border would "have potentially catastrophic economic impact on our country" and that he hoped "we would not be doing that." The Chamber of Commerce, National Association of Manufacturers, and the American Automotive Policy Council have all warned of the ripple effect. NAM said that companies are expected to lose $726 million for every day the border is closed.

Trump doesn't seemed to be bothered by any of this. "Sure, it will have a negative effect on the economy," Trump told reporters in the Oval Office on Tuesday afternoon. "But to me, trading is very important, the borders are very important, but security is what is most important." House Democrats may compel

Republicans to go on the record about whether the border should be closed, Sarah Ferris and Laura Barrón-López report, possibly as early as this week. More here.

Related read: "Nielsen pushing lawmakers to make it easier to deport asylum seekers," from POLITICO's Ted Hesson

ON THE HILL

ACOSTA TO THE HILL: Today at 2 p.m. Labor Secretary Alexander Acosta will testify before a House appropriations panel on DOL's budget request. It's the first time Acosta has appeared before Congress since a federal judge ruled illegal a plea deal Acosta struck with billionaire pedophile Jeffrey Epstein a decade ago, when Acosta was U.S. attorney for southern Florida. Acosta will also have to defend a budget request that would cut his department by 9.7 percent. It's the third time the White House has sought to slash DOL's budget; the two previous attempts were unsuccessful. The hearing is in Rayburn 2358-C. Watch a livestream here.

2020 WATCH

PELOSI ON BIDEN: Speaker Nancy Pelosi told POLITICO Playbook Tuesday that she doesn't think recent allegations that Joe Biden touched two women inappropriately disqualify him for a 2020 run, but said the former vice president should be more aware of others people's "space," POLITICO's Rebecca Morin reported. "He has to understand in the world that we're in now that ... what's important is how [others] receive it and not necessarily how you intended it," Pelosi said. One woman has described Biden pulling her close to rub noses at a 2009 fundraiser, and another has accused Biden of an "awkward kiss" on the head at a campaign rally in 2014. More from Morin here.

More on the 2020 front: "Presidential hopeful Julián Castro releases immigration platform," from POLITICO's Ted Hesson

GOOGLE REQUIRES ITS CONTRACTORS TO PAY $15 WAGE, BENEFITS: Google said Tuesday that it will require its contractors to pay "health benefits, sick leave, a $15 minimum wage, paid parental leave, and $5,000 a year for education," the Hill reports. The announcement came after more than 900 Google workers signed a letter pressing the company on the treatment of Google temps, vendors, and contract employees, noting that this last group accounts for 54 percent of Google's workforce. The tech giant's employees have been increasingly vocal in

recent months. Some 20,000 walked out of their offices in November to protest the company's reportedly shielding one of its software creators following a credible sexual assault allegation. Organizers of the walkout have since created a Twitter account called "Google Walkout for Real Change" and joined lawmakers on Capitol Hill in February to back legislation barring companies from compelling employees to take workplace disputes to private arbitration.

FIGHT FOR $15, UNAPPEASED: Workers at McDonald's locations across the country, judging the fast-food giant's decision last week to halt lobbying against minimum wage hikes to be insufficient, will protest today during the lunchtime rush in nearly a dozen cities, POLITICO's Rebecca Rainey reports. At rallies organized by the SEIU-backed Fight for $15 in Los Angeles, Chicago, Miami, St. Louis and other cities, workers will call on McDonald's to respect their union rights and to lobby for minimum wage increases.

The protests after McDonald's sent a letter last week to the National Restaurant Association stating that the company would no longer lobby against minimum-wage hikes and that the conversation about wages is one the McDonald's wishes "to advance, not impede."

"McDonald's' decision doesn't change my life one bit," Bleu Rainer, a Tampa McDonald's worker in the Fight for $15 said in a statement. "What would change my life is what we've been asking for since Day 1: $15 and union rights." More here.

JOINT EMPLOYER

DOL DOESN'T KNOW HOW MUCH ITS JOINT EMPLOYER PROPOSAL WILL SAVE: Republicans and business groups on Monday lauded DOL's proposed rule narrowing the circumstances under which a business will be held jointly liable for its franchisees' or contractors' violations of the Fair Labor Standard Act. But a

regulatory expert from the left-leaning nonprofit Public Citizen pointed out to Morning Shift that DOL failed to calculate any regulatory cost savings. That's because, DOL wrote in the text of the proposed rule, there were no data available "on the number of joint employers, and the number of joint employer situations that could be affected."

At the same time, DOL conceded in the text that "regulatory familiarization" would impose on employers costs that could range from $320.7 million to $412.1 million in the first year of the rule's implementation, and an average annual cost of $42.7 million to $54.8 million over 10 years. In a written statement, DOL told Morning Shift that "there is an initial cost associated with companies and organizations familiarizing themselves with the rule" but that "over time the clarity this proposal would bring could reduce the resources spent by organizations to determine whether they are joint employers as well as on FLSA-related litigation."

A Trump executive order requires that every new regulation be offset with two deregulatory actions. In the proposal, DOL writes that it "expects" the joint-employer rulemaking will qualify as a "deregulatory action." Maybe so. But OMB's guidance for the deregulatory order defines a deregulatory action as one that "has total costs less than zero."

ON TAP

At 9 a.m.: Republican Sen. Bill Cassidy will speak at an American Enterprise Institute panel on paid family leave. POLITICO's Ian Kullgren reported that the Louisiana Republican is working on a bill with first daughter Ivanka Trump with the hope of winning support from Republicans. The event is at at AEI headquarters. Find more info here.

At 10 a.m.: The Aspen Institute Future of Work Initiative will hold a discussion on "The Age of Automation: Policies for a Changing Economy." Former Sen. Heidi Heitkamp, (D-N.D.), and Kristen Silverberg, executive vice president for policy at the Business Roundtable will participate. The event takes place at the Aspen Institute on 2300 N Street NW.

At 1:30 p.m.: Rep. Ben Ray Luján, (D-N.M.), will participate in a conference call briefing with immigrant youths and advocates to call for passage of H.R. 6 (116), the "Dream and Promise Act."

At 4 p.m.: The American Bar Association's Section on Administrative Law and

Regulatory Practice will hold a conference call briefing on "The Future of Seminole Rock Deference? Analyzing the Oral Argument in Kisor v Wilkie," focusing on Supreme Court's review of the doctrine of judicial deference to agencies' interpretations of regulations. Find more info here.

At 5 p.m.: The American University School of Public Affairs hosts a "FEDTalks" 2019 Key Executive Leadership Programs Speaker Series on "Women and the Future," examining "trends and cultures surrounding women in the workplace, evaluate unconscious biases and innovative policies, and discuss how women can be successful in the face of today's challenges through resilience and vision." Secret Service CFO Gwendolyn Sykes, and Zina Sutch, deputy associate director of outreach, diversity and inclusion at the Office of Personnel Management will participate. The event takes place at the Carnegie Endowment for International Peace. More info here.

COFFEE BREAK

— "Labor unions wade into 2020 race with caution after being burned in 2016," from The Los Angeles Times

— "White House whistleblower says she felt humiliated after retaliation from boss," from NBC Nightly News with Lester Holt

— "Pioneering legal pot states aim to ease rules on industry," from The Associated Press

— "Homeland Security Disbands Domestic Terror Intelligence Unit," from The Daily Beast

— "Democrats race to embrace legal weed," from POLITICO

— "In whistleblower suit, ex-Microsoft employee alleges she was terminated for reporting discrimination," from GeekWire

THAT'S ALL FOR MORNING SHIFT!

From:	Shorter, LaDonna
To:	Merberg, Elinor; Bridge, Diane L.; Bush, Lynn; Carlton, Peter J.; Colwell, John F.; Emanuel, William; Free, Douglas; Habenstreit, David; Jacob, Fred; Jacob, Chris W; Kaplan, Marvin E.; Kelly, David A.; Krafts, Andrew J.; Lennie, Rachel G.; Lesesne, Katherine; Lussier, Richard; McFerran, Lauren; Meyers, Mary; Murphy, James R.; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Sophir, Jayme; Stock, Alice B.; Tursell, Beth; Vazquez, Laura T.; Zick, Lara S.; Murphy, Paul; Shorter, LaDonna
Subject:	Section 10(j) results: Pacific Green Trucking, Inc., Case 21-CA-226775
Date:	Wednesday, April 3, 2019 2:10:12 PM
Attachments:	OrderGranting.PacificGreen.pdf ILB.internalresults.21-CA-226775.PacificGreen.docx

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On January 4, 2019, the Board authorized the institution of Section 10(j) proceedings in this nip-in-the-bud case involving, among other things, the Employer's discharge of a leading Union activist. The Region was directed to seek, among other things, interim reinstatement of the discriminatee.

On April 1, 2019, the U.S. District Court for the Central District of California issued the attached order granting in full the injunctive relief requested, including a narrow cease and desist remedy, plus an affirmative order of reinstatement and a reading of the order.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM B. COWEN, Plaintiff, v. PACIFIC GREEN TRUCKING, INC., Defendant.	Case No. 2:19-cv-00663-AB-RAO ORDER GRANTING PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT

Before the Court is a Petition for a Temporary Injunction under Section 10(j) of the National Labor Relations Act ("NLRA"), filed by Petitioner William B. Cowen, Regional Director of Region 21 of the National Labor Relations Board ("Petitioner"). (Dkt. No. 1, "Pet.") Petitioner alleges that Respondent Pacific Green Trucking, Inc. ("Pacific Green") has engaged in unfair labor practices against employees affiliated with the International Brotherhood of Teamsters ("the Union"). As of the date of this Order, Pacific Green has not filed an opposition or otherwise appeared in this action. For the reasons discussed below, the Court **GRANTS** the Petition.

I. BACKGROUND

On January 29, 2019, Petitioner filed the instant Petition for Temporary Injunctive Relief under Section 10(j) of the NLRA. Petitioner contends that it will likely prevail on the merits of the underlying administrative proceeding in Board Case

21-CA-226775, alleging that Pacific Green engaged in, and continues to engage in, unfair labor practices in violation of Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3), that affect commerce within the meaning of Sections 2(6) and (7) of the Act, 29 U.S.C. § 152(6) and (7). Specifically, Petitioner contends that Pacific Green's general manager interrogated the primary union supporter, Ricardo Bonilla Colindres ("Bonilla"), about his union activities, threatened him with discharge because of his union activities, refused to assign him work, and terminated his employment because of his union activities.

On February 13, 2019, Administrative Law Judge Jeffrey Wedekind ("the ALJ") issued an administrative decision and recommended order in which he found that Pacific Green committed the same unfair labor practices Petitioner seeks to enjoin in this proceeding. Shortly thereafter, Petitioner requested that this Court take judicial notice of the ALJ's decision.[1] (*See* Dkt. No. 15-1.)

II. LEGAL BACKGROUND

This case involves "some of the most fundamental provisions of the NLRA—Section 8(a)(1) [and] (3)." *Coffman v. Queen of Valley Med. Ctr.*, 895 F.3d 717, 724 (9th Cir. 2018); *see* 29 U.S.C. § 158(a)(1), (3). Section 8(a)(1) prohibits employers from "interfer[ing] with . . . employees in the exercise of the rights guaranteed" under the NLRA, such as "the right to . . . join[ ] or assist labor organizations [and] to bargain collectively through representatives of their own choosing." *Id.* §§ 157, 158(a)(1). Section 8(a)(3) similarly prohibits employers from "discriminat[ing] in regard to . . . any term or condition of employment to . . . discourage membership in any labor organization." *Id.* § 158(a)(3).

Section 10(j) authorizes the Board to seek a preliminary injunction in federal

[1] The Court takes judicial notice of the ALJ's decision pursuant to Federal Rule of Evidence 201. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1186 (9th Cir. 2011). The Court does not rely on the ALJ's decision, but if it did, the ALJ's decision would provide additional support for the Court's findings.

district court to enjoin an employer's unfair labor practice. *Id.* § 160(j). The district court may grant "such temporary relief . . . as it deems just and proper" under the NLRA. *Id.* Courts apply the preliminary injunction standard set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), which requires that Petitioner show (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Id.*; *see Coffman*, 895 F.3d at 724-25.

III. DISCUSSION

A. Likelihood of Success on the Merits

Petitioner has demonstrated a likelihood of success on the merits of the underlying Board case. To show a likelihood of success on the merits, Petitioner must show a "probability that the Board will issue an order determining that the unfair labor practices alleged by the . . . Director occurred and that this Court would grant a petition enforcing that order." *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012) (*Frankl II*) (quoting *Frankl ex rel. NLRB v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011) (*Frankl I*)). Petitioner meets this burden if it can "produc[e] some evidence to support the unfair labor practice charge, together with an arguable legal theory." *Id.* (quoting *Frankl I*, 650 F.3d at 1356) (alteration in original). The Regional Director's petition for a 10(j) injunction is owed "special deference" when the Board authorizes it, since this may indicate the Board's eventual decision on the merits. *Id.* at 1062 (citing *Small,* 661 F.3d at 1187).

Here, Petitioner has presented evidence that Pacific Green's manager, Vicente Zarate, made disparaging comments about unions and told Bonilla he should not get involved with the union because he, Zarate, was the one who employed him; that Zarate made these comments knowing that Bonilla was involved with the union; that Zarate told Bonilla that if he heard Bonilla was "fighting" with other drivers again, he

would fire him; that Zarate used the word "fighting"[2] with drivers as a euphemism for discussing or debating the union with drivers; that Zarate sent Bonilla home early one day after Zarate made the above statements even though additional work could have been assigned to Bonilla; that Zarate subsequently fired Bonilla and later told him it was because he was "fighting" with other drivers and he did not want other workers "fighting"; and that Zarate told a Teamsters organizer that Bonilla was fired because he had been having problems with drivers "fighting."

The Ninth Circuit holds "[a]n employer discriminates against an employee under the NLRA 'when the employee's involvement in a protected activity was a substantial or motivating factor in the employer's decision to discipline or terminate the employee.'" *Coffman*, 895 F.3d at 729 (quoting *Frankl II*, 693 F.3d at 1062). To establish that the conduct was a substantial or motivating factor, the petitioner need only show that "the employee was engaged in protected activity, the employer knew of such activity, and the employer harbored anti-union animus." *Id.* Then, the burden shifts to the employer "to demonstrate that it would have taken the same action regardless of the employee's union activity." *Id.* "[A]n employer cannot overcome this burden where its asserted reasons for a discharge are found to be pretextual." *Id.* (internal quotation marks and citations omitted).

Petitioner's evidence in the record is sufficient to establish a prima facie case, and that any asserted justification is pretextual. Petitioner has therefore shown a likelihood of success on the merits.

B. Likelihood of Irreparable Harm

Petitioner has presented sufficient evidence to demonstrate a likelihood of irreparable harm due to Pacific Green's unfair labor practices. If the petitioner

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[2] Petitioner points out that Zarate used the Spanish word "peleando" when he accused Bonilla of "fighting" with his coworkers. (Pet. at 8 n.7.) In the proceeding before the ALJ, the interpreter explained that "peleando" could be interpreted as "fighting" in the physical sense or struggling alongside others in support of unionization. (*Id.*; Pet., Ex. 3, 197-98, 343.)

"presents evidence of an employer's 'clear hostility toward the Union, as well as a pattern of discrimination against employees active in the Union,'" the petitioner "establishes a likelihood of irreparable harm for a preliminary injunction." *Coffman*, 895 F.3d at 730 (quoting *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 501-02 (7th Cir. 2008).

Here, Petitioner's evidence shows that Zarate engaged in retaliatory and hostile acts against union supporters on several occasions. The evidence also indicates dissipation of employee participation in union activities and employee fear of retaliation and discrimination by Pacific Green. *See id.* at 728; *Frankl I*, 650 F.3d at 1363. Petitioner has therefore offered sufficient evidence of a likelihood of irreparable harm in the absence of an injunction.

C. Balance of Equities and Public Interest

As stated above, if a likelihood of irreparable harm and success on the merits is established, "the [Regional Director] will have established that preliminary relief is in the public interest," and there is considerable support for a finding that the equities weigh in favor of an injunction. *Frankl I*, 650 F.3d at 1365; *Coffman*, 895 F.3d at 729 ("[W]hen the 'Director makes a strong showing of likelihood of success and of likelihood of irreparable harm, the Director will have established that preliminary relief is in the public interest.'") (citation omitted). "In § 10(j) cases, the public interest is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Small*, 661 F.3d at 1197 (quoting *Frankl,* 650 F.3d at 1365). Nor has Pacific Green articulated any countervailing interest to justify denial of injunctive relief. The Court finds that "[w]ithout an injunction," Pacific Green "will have succeeded at least for now in its efforts to resist the union organizing effort." *Id.* at 1196.

Accordingly, the Court finds that the latter two factors of the preliminary injunction analysis also weigh in favor of granting injunctive relief.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Petition for Temporary Injunctive Relief Under Section 10(j).

Based upon the record, as well as the foregoing, it is **ORDERED, ADJUDGED AND DECREED**, that, pending final disposition of the matter now pending before the Board, Pacific Green, its officers, agents, supervisors, employees, attorneys, and all persons acting in concert or participation with it are hereby enjoined and restrained from:

(a) Threatening employees with job loss because they engage in protected union activity;

(b) Denying work to employees because they engage in protected union activity;

(c) Terminating employees because they engage in protected union activity;

(d) In any like or related matter interfering with employees in the exercise of their Section 7 rights.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matter herein now pending before the Board, Pacific Green, its officers, representatives, supervisors, agents, employees, attorneys, and all persons acting on its behalf or in participation with it, shall take the following affirmative steps **within five (5) business days** of the issuance of the Court's order:

(a) Offer, in writing, Ricardo Bonilla Colindres interim reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, displacing any employee who has taken his former position and shift, if necessary;

(b) Rescind and remove from Respondent's personnel files all references to the termination of Ricardo Bonilla Colindres, pending the final decision

of the Board, and notify him in writing that this has been done and that the discharge will not be used against him in any way;

(c) Post copies of this Order in English and Spanish at Pacific Green's facility, including all places where notices to its employees are customarily posted; maintain these postings during the pendency of the Board's administrative proceeding free from all obstructions and defacements; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to its facilities to monitor compliance with this posting requirement. Translation of this Order to Spanish shall be at Pacific Green's expense. The translation shall be approved by the Regional Director;

(d) **Within fifteen (15) days** of the issuance of this Order, hold a mandatory meeting or meetings, during work time at a time scheduled to ensure maximum employee attendance, at which this Order is to be read in English and Spanish to employees at Pacific Green's Wilmington, California facility by a responsible management official in the presence of a Board agent, or at Pacific Green's option, by a Board Agent in the presence of a responsible management official.

(e) **Within twenty (20) days** of the issuance of this Order, file with the Court and serve upon the Regional Director of Region 21 of the Board, a sworn affidavit from a responsible official describing with specificity the manner in which Pacific Green has complied with the terms of this Order, including how and when it posted the documents required by this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall maintain continuing jurisdiction to enforce this Order. Petitioner must notify the Court no later than **ten (10) days** of the disposition of matters pending before the Board and seek an order dissolving the injunction and dismissing the Petition.

Petitioners must also file a report every **120 days** informing the Court about the status of Board proceedings.

IT IS SO ORDERED.

Dated: April 1, 2019

HONORABLE ANDRE BIROTTE JR.
UNITED STATES DISTRICT JUDGE

NITED STATES GOVERNMENT

memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: April 3, 2019

TO: Peter B. Robb
General Counsel

FROM: Jayme L. Sophir
Associate General Counsel

SUBJECT: Pacific Green Trucking, Inc.
Case 21-CA-226775

On January 4, 2019, the Board authorized the institution of Section 10(j) proceedings in this nip-in-the-bud case involving, among other things, the Employer's discharge of a leading Union activist. The Region was directed to seek, among other things, interim reinstatement of the discriminatee.

On April 1, 2019, the U.S. District Court for the Central District of California issued the attached order granting in full the injunctive relief requested, including a narrow cease and desist remedy, plus an affirmative order of reinstatement and a reading of the order.

/s/
J.L.S.

Attachment

cc: The Board
Solicitor's Office
Executive Secretary
Operations Management

H:injlit/10j/ILB.internalresults.21-CA-226775.PacificGreen

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Wednesday, April 3, 2019 4:34:31 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Insulin-Dependent Bus Mechanic Gets Trial Over Need to Drive

By Patrick Dorrian

A trial is necessary to determine whether a Pennsylvania transit agency violated a mechanic's job rights when it fired him after his diabetes became insulin dependent, a federal judge ruled.

NLRB Topples Precedent for Companies Acquiring Union Firms

By Robert Iafolla

A company that takes over a unionized workplace and tries to dodge its bargaining obligations by not hiring some of the previous employer's workers no longer has to adhere to the labor deal that was previously in place.

Lawyer's Mistake No Reason to Revive Postal Worker's Bias Suit

By Patrick Dorrian

A Pittsburgh mail carrier was too late to sue the U.S. Postal Service for withdrawing his job accommodation for his stroke-related climbing restrictions, the Eleventh Circuit said.

Los Angeles Plan for Fully Paid Parental Leave Gets Council OK (1)

By Genevieve Douglas

Los Angeles City Council members unanimously approved a plan to augment existing state funding for paid parental leave to establish up to 18 weeks of fully paid leave for new parents.

DISCRIMINATION

Jones Day Accused by Female Lawyers of Sex Bias, Unequal Pay (1)

By Porter Wells and Robert Iafolla

Six women filed a lawsuit against international law firm Jones Day accusing it of systemic discrimination against its female associates by way of lower pay and narrowed career opportunities.

MLB Fires Back at Umpire Who Wants to Speak Publicly About Bias

By Patrick Dorrian

A Major League Baseball umpire has no legal basis for a court order allowing him to speak publicly about the job bias he's allegedly faced, the league says.

WAGE & HOUR

Motel 6 Wage Suit Sent Back to California State Court

By Brian Flood

A lawsuit accusing Motel 6 of employment law violations will be moved back to a California state court, a federal court said April 2.

Kentucky Exotic Dancer Avoids Arbitration of Wage Claim

By Bernie Pazanowski

An exotic dancer at a gentleman's club in Kentucky doesn't have to arbitrate her wage claims against the club, a federal district court said.

HARASSMENT & RETALIATION

Ex-NFL Official Alleges Retaliation Over Fraud Claims

By Steven M. Sellers

The National Football League and a non-profit sports organization retaliated against a long-time referee for reporting financial irregularities by a chapter of the Texas Association of Sports Officials, a new lawsuit alleges.

STATE & LOCAL LAWS

Catholic School Pushes Back Against LGBT Bias Protections (1)

By Mike Leonard and Erin Mulvaney

A Catholic high school challenged a Cleveland suburb's ordinance that bans discrimination based on sex, sexual orientation, and gender identity and says it represents "an existential threat to its existence," in the latest clash between a religious group's push for freedom and the social movement driven toward protecting LGBT individuals.

Salary History Queries New No-No for North Carolina Agencies (1)

By Andrew M. Ballard

North Carolina agencies are barred from asking job applicants about their salary histories under a new executive order.

IMMIGRATION

Future of Ag Labor Unclear Despite Agreement on Need for Change

By Laura D. Francis

There's bipartisan agreement that Congress needs to do something to ensure that the agriculture industry has an adequate supply of labor. What that something is remains to be seen.

Big Immigration Impact Could Come From Modest Deficit Proposal

By Laura D. Francis

A line item tucked away in the fiscal year 2020 budget proposal could have an impact far beyond the deficit reduction it's meant to achieve.

LEGAL PRACTICE

Law Firms Weigh Retirement Rules as Baby Boomers Keep Practicing

By Elizabeth Olson

Baby Boomers are edging near and crossing over customary retirement age, but an expected wave of partner departures has yet to surface since many lawyers are working past 65, and some into their 70s.

HEALTH CARE & BENEFITS

SCOTUS Asked to Hear $30M Suit by Feds Over Findlay Pension

By Jacklyn Wille

Companies connected to defunct auto parts maker Findlay Industries asked the U.S. Supreme Court to reverse a decision that would allow them to be liable for $30 million in Findlay's pension liabilities.

Oracle Workers Renew Bid for Jury Trial in 401(k) Class Action

By Jacklyn Wille

Oracle Corp. workers continue to push for a jury trial in their class action challenging the investment options in their $12 billion 401(k) plan.

ABB, Workers Get Early Approval for $55M 401(k) Settlement

By Jacklyn Wille

ABB Inc.'s $55 million settlement with investors in its 401(k) plan won preliminary court approval April 2.

Ex-Illinois Tool Manager Wins Revival of Severance Lawsuit

By Jacklyn Wille

A former Illinois Tool Works Inc. manager will get another chance to seek severance benefits.

Google to Require Contractors Get Health Care, Parental Leave

By Gerrit De Vynck

Google will require contracting companies it does business with to give employees health care, parental leave and other benefits. The decision comes after months of activism from Google staff and contractors asking for equal treatment.

HUMAN RESOURCES

Carrots in the Kitchen: Eateries Use Health Care to Lure Staff

By Madison Alder and Paige Smith

When Sonja Finn opened Pittsburgh's Dinette in 2008, she offered health benefits to full-time employees right off the bat. It was a business choice she knew she had to make, despite the cost and hassle.

SAFETY & HEALTH

Employers Exposed When Women's Safety Equipment Doesn't Fit

By Fatima Hussein and Jaclyn Diaz

The military has been asking for equipment sized to the female body since 1978. Last month, an advisory panel on women in the Armed Forces made that request again.

Fatal Explosion at Houston Chemical Plant Draws Federal Probe

By Sam Pearson

Federal investigators will probe a Houston-area chemical plant where one worker was killed and two were injured in an April 2 fire and explosion.

ALSO IN THE NEWS

Acosta Faces Budget Panel on Funding, Epstein Case

By Jaclyn Diaz and Tyrone Richardson

House Democrats April 3 pressed Labor Secretary Alexander Acosta on a proposed 10 percent cut to the agency's budget, recent controversial regulatory proposals, and a decade-old plea deal in which Acosta allegedly helped an accused sex offender skirt the harshest punishment for crimes against teens.

Workplace Automation Demands Government Strategy, Panelists Say

By Tyrone Richardson

The federal government should collaborate with private industry to get the nation's employees trained for increasingly automated workplaces, panelists at an April 3 Aspen Institute event said.

Contractor Watchdog in High-Tech Pacific Area Has New Head (1)

By Paige Smith

Jane Suhr is now at the helm of the Labor Department's Office of Federal Contractor Compliance Programs Pacific Region, the agency confirmed to Bloomberg Law.

U.S. Firms Post Weakest Job Growth in 18 Months, ADP Says (1)

By Katia Dmitrieva

U.S. companies added the fewest workers in March since late 2017 as construction and manufacturing cut jobs, according to a private report that signals potential weakness in employment ahead of the monthly Labor Department data April 5.

U.S. Service Gauge Falls by More Than Expected to 19-Month Low (1)

By Reade Pickert

A gauge of U.S. service industries fell in March by more than expected to the lowest level since mid-2017 amid weaker business and new orders, adding to signs economic growth is cooling this year.

Google's U.S. Workforce Grew More Asian, Less White and Male (1)

By Jeff Green

Google's workforce employed fewer white, male employees as the already over-represented Asian workforce grew and women and people of color showed less obvious improvement.

New Work Suits: Lockheed Martin Whistleblowers Allege Fraud

By Cynthia Harasty

Lockheed Martin Aeronautics Co. engaged in defense contract frauds, according to a whistleblower lawsuit filed in federal court.

After Cutting 802,000 Jobs, Some Big Banks Are Adding Staff (1)

By Yalman Onaran

Hundreds of thousands of jobs have disappeared on Wall Street since the 2008 financial crisis and some of the biggest banks haven't stopped cutting. Still, some firms managed to reverse the trend and are slowly boosting staff levels.

PRACTITIONER INSIGHTS

INSIGHT: Avoiding Women Is No #MeToo Answer—Good Training, Messaging Is

Since the #MeToo movement started, employers are working to prevent and respond to sexual misconduct, but now many men may feel at risk and avoid women altogether. Jonathan Segal of Duane Morris offers training and

messaging tips for employers to ease the anxiety some men feel in the workplace.

LATEST CASES

Case: Labor Relations/Federal Preemption (N.D. Ill.)

Three former employees of Altria Group, Inc. who were accused of criminal activity regarding "non-product related material" found at a Franklin Park, Illinois smokeless tobacco factory don't have breach-of-contract claims against Altria for allegedly firing them without cause, failing to perform a proper investigation, refusing to allow a union representative to attend investigatory meetings with them, and drilling out the locks on their toolboxes without a union representative present. Federal labor law preempts the claims, and the plaintiffs can't proceed under federal labor law because they didn't allege that their union breached its fair-representation duty. The case is Schreiner v. U.S. Smokeless Tobacco Co., 2019 BL 115789, N.D. Ill., No. 17 C 7530, 4/1/19.

Case: Labor Relations/Government Employment (Pa. Commw. Ct.)

A state employee failed to establish the required showing of interest to trigger a hearing and election to decertify a bargaining unit of professional inspection, investigation and safety services employees. The employee, who gathered the authorization cards he submitted and knows the identities of the signing employees, argued that the Pennsylvania Labor Relations Board should provide information to allow him to assess the propriety of its rejection of each card it didn't count, but the PLRB's regulations expressly preclude collateral attacks on its decisions concerning the cards. The case is Grube v. Pa. Labor Relations Bd., 2019 BL 115508, Pa. Commw. Ct., 76 C.D. 2018, 4/2/19.

Case: Wage & Hour/Collective Certification (N.D. Ill.)

Installation employees of an Illinois fence company didn't show that they are sufficiently similarly situated to support a collective action for unpaid overtime and other wage violations. Their allegations, including conclusory statements that they weren't paid overtime and that they merely suspected the company insisted on using a piece-work compensation method with other employees as well as themselves, aren't enough to show that they were subject to a common

policy. The case is Haack v. N. Ill. Fence, 2019 BL 116342, N.D. Ill., No. 17 CV 2854, 4/2/19.

Case: Disability Discrimination/Remand (C.D. Cal.)

An injured California-resident employee of a Pennsylvania-based staffing company can't take his state-law disability bias claims after he was fired while on disability leave back to his home-state court, because a possible attorneys' fee award of one-third of the combination of lost wages with emotional distress and punitive damages, when added together, pushes the amount in controversy past the $75,000 threshold for federal court diversity jurisdiction. The case is Lopez v. Healthcare Servs. Grp., Inc., 2019 BL 116852, C.D. Cal., LA CV18-10271 JAK (JDEx), 4/2/19.

Case: Labor Relations/Public Employees (Pa. Commw. Ct.)

A former state employee failed to establish the required showing of interest to trigger a hearing and election to decertify a bargaining unit of professional inspection, investigation and safety services employees. He argued that the Pennsylvania Labor Relations Board shouldn't have included nonmembers in calculating the number of authorization cards needed to reach the 30 percent threshold, but the state Public Employe Relations Act expresses the required showing of interest as a percentage of the employees within a bargaining unit, and all employees in the unit are entitled to vote on decertification. The case is Angelucci v. Pa. Labor Relations Bd., 2019 BL 115464, Pa. Commw. Ct., 75 C.D. 2018, 4/2/19.

Case: Discrimination/Retaliation (D. Haw.)

ManTech International must defend against claims that it retaliated against a former employee of Filipino and African-American descent after he complained of racial harassment while working overseas in Kuwait. Within a month of his harassment complaint, among other things, his supervisors denied his numerous requests to repair his vehicle—rendering it unsafe—then reprimanded him for refusing to drive the unsafe vehicle, and refused to cancel a job transfer that he had requested after he changed his mind about leaving Kuwait, the court said. The case is Scott v. ManTech Int'l Corp., 2019 BL 117304, D. Haw., Civ. No. 18-00359 JMS-RT, 4/2/19.

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

In a 3-1 decision overruling a 1996 precedent, the NLRB holds that a successor employer that discriminatorily refuses to hire a targeted number of a predecessor's employees to avoid an obligation to bargain with their union over initial terms of employment need not restore the predecessor's terms. The wrong committed by such discriminatory hiring practices can be effectively addressed by the traditional make-whole remedies of reinstatement and back pay for affected employees, and retroactive imposition of the predecessor's employment terms—with back pay and interest—runs counter to the principle that initial terms must generally be set by "economic power realities." The case is Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc., 2019 BL 116178, N.L.R.B., 4/2/19.

Case: Individual Employment Rights/First Amendment (2d Cir.)

A rejected tenure candidate at the State University of New York in Oneonta failed to plausibly allege that members of a hiring committee at SUNY violated his First Amendment rights to free speech and academic freedom. The negative evaluation that SUNY gave the candidate conveyed legitimate concerns about his teaching philosophy and his practical skills as a teacher, and the university didn't violate his rights by requiring him to give a teaching demonstration, because it had a legitimate interest in ensuring teaching candidates can communicate ideas effectively. The case is Committe v. Yen, 2019 BL 115601, 2d Cir., 18-1540-cv, 4/2/19.

Case: Individual Employment Rights/False Claims Act (D. Conn.)

An employee of Pratt and Whitney hired to assist in the robotic spray coating of military jet engine parts for F-22 jets, plausibly alleged retaliation because of his protected activity under the False Claims Act. He complained that he reported to a supervisor and management that Integrally Bladed Rotors manufactured at a Connecticut PW plant were failing testing required by a government contract, because the parts weren't being properly spray coated, and that cheating was involved in the testing process. The employee put PW on notice of its potential FCA liability, and he plausibly alleged that the stated reason for his termination—a conflict of interest—was pretextual, a court said. The case is United States ex rel. Bonzani v. United Techs. Corp., 2019 BL

114050, D. Conn., No. 3:16-CV-1730 (JCH), 4/1/19.

Case: FMLA/Retaliation (W.D. Va.)

A welder at a Virginia auto manufacturing plant adequately stated claims for Family and Medical Leave Act retaliation and interference after he was approved for FMLA leave on learning that both of his sons were headed to the emergency room due to serious illness but nonetheless was fired for excessive absenteeism four days later. One week earlier, he had requested intermittent FMLA leave for one son with cerebral palsy but hadn't yet completed the medical certification for that request, but even if the plant reasonably believed his later request was based on the same medical condition, the timing of his termination without an explanation as to why his absence wasn't covered permit a finding of retaliatory intent and interference, the court found. The case is Trail v. Util. Trailer Mfg. Co., 2019 BL 116175, W.D. Va., 1:18CV00037, 4/2/19.

Case: Disability Discrimination/Essential Functions (M.D. Pa.)

A diabetic mechanic for the Lebanon County, Pennsylvania, transit authority can go ahead with his disability bias and failure-to-accommodate claims after he was fired when his Department of Transportation medical examiner's certification was revoked because he had become insulin dependent, so that he couldn't drive passengers for emergency road calls. While the parties agree that conducting state inspections and road tests are essential job functions, he questions whether the same is true for emergency transportation of passengers given the rarity of such situations, the lack of a written policy requiring such driving, and the possibility that he could get state certification that would allow him drive in-state without the DOT certificate, the court found. The case is Miller v. Cty. of Lebanon Transit Auth., 2019 BL 115735, M.D. Pa., No. 1:17-CV-1368, 4/2/19.

Case: Discrimination/Hiring (2d Cir.)

The State University of New York in Oneonta was properly awarded judgment on a job applicant's claim that he wasn't hired for a teaching position based on his age, because the applicant's mere assertion that the university chose younger, less-qualified candidates isn't enough to show age discrimination. He

didn't say what the qualifications for the position were, nor what qualifications he or the other candidates had, and he had no evidence to support his argument that he was given low ratings as a pretext to refrain from hiring him. The case is Committe v. Yen, 2019 BL 115601, 2d Cir., 18-1540-cv, unpublished 4/2/19.

Case: Labor Relations/Airline Employees (D. Mass.)

The Railway Labor Act preempts three retired flight attendants' claims that American Airlines, Inc. was unjustly enriched when it eliminated their benefit of free travel under the same priority boarding status as active employees. Assuming that the airline received a benefit from their retirement, it cannot have been unjustly enriched by discontinuing the benefit if its 2005 and 2013 labor contracts allow the airline to discontinue the benefit in accordance with "Company policies," a federal district court finds. The case is Van v. Am. Airlines, Inc., 2019 BL 114423, D. Mass., No. 17-11418-MLW, 3/30/19.

From: Employment Law360
To: Ring, John
Subject: Ex-Jones Day Associates Hit Firm With $200M Bias Suit
Date: Thursday, April 4, 2019 3:54:26 AM

EMPLOYMENT

Thursday, April 4, 2019

TOP NEWS

Ex-Jones Day Associates Hit Firm With $200M Bias Suit

A group of former Jones Day associates hit the BigLaw powerhouse with a $200 million pregnancy and gender discrimination suit Wednesday, accusing the firm of systematically underpaying women, devaluing the work of female associates and pushing out lawyers who have children.

Read full article »

NLRB Upends Precedent On Successor Bargaining Duties

In a reversal of precedent, a split National Labor Relations Board held that the new owners of a skilled nursing facility didn't have to bargain with a preexisting union before changing work conditions, though it should have recognized the union.

Read full article »

Allen & Overy Atty For Weinstein Referred For Discipline

An Allen & Overy attorney has been referred to a U.K. disciplinary tribunal following an investigation into alleged misconduct connected to the representation of disgraced movie mogul Harvey Weinstein and the use of nondisclosure agreements to hush up allegations of sexual assault.

Read full article »

Acosta Defends DOL Rules, Epstein Case Handling At Hearing

Labor Secretary Alex Acosta was grilled during a budget hearing Wednesday over whether the U.S. Department of Labor has weakened worker protections under his watch and claims that he mishandled a decade-old sex crime case involving millionaire sex offender Jeffrey Epstein, with Acosta defending his actions on both fronts.

Read full article »

Analysis

GC Missteps Loom Large In Mass. Regulator's Wynn Probe

Executives in the legal division of Wynn Resorts were among those flagged in a regulator's report detailing how sexual abuse allegations against ex-CEO and Chairman Steve Wynn were swept under the rug. Here, Law360 looks at how those attorneys may have failed to serve their ultimate client, the company.

Read full article »

Railroads Urge Justices To Hear BNSF Job Applicant MRI Row

The railroad industry has asked the U.S. Supreme Court to review a Ninth Circuit ruling that BNSF Railway Co. illegally rescinded a job offer to an applicant who declined to pay for his own MRI, saying the parameters for railroad hiring practices are now blurred.

Read full article »

DISCRIMINATION

1st Circ. Mulls Sending Harvard Gender Bias Case To Jury

Law360 Pro Say Podcast

Listen to our new podcast here

New Cases

Discrimination (41)
ERISA (26)
Labor (42)

LAW FIRMS

Allen & Overy
Arguedas Cassman
Ashby & Geddes
Brown Rudnick
Bryan Cave
Burr & Forman
Call & Jensen
Correia & Puth
Davis Wright Tremaine
Debevoise & Plimpton
Feldesman Tucker
Fisher Phillips
Foley Hoag
Gibson Dunn
Gladstein Reif
Hooper Lundy
Jones Day
Keating Muething
Kirkland & Ellis
Kupferstein Manuel LLP
Latham & Watkins
Lucas Magazine
Meriwether & Tharp
Messner Reeves

Whether Harvard University discriminated against a female anthropology professor in denying her tenure bid may be a question best answered by a jury, a First Circuit judge said Wednesday as the panel heard oral arguments in the case.

Read full article »

Ashley Judd's Weinstein Suit Put On Hold For Criminal Trial

A California federal judge has paused actress Ashley Judd's suit claiming Harvey Weinstein launched a smear campaign that kept her from being cast in "The Lord of the Rings" after she rebuffed his sexual advances, staying the case until Weinstein faces a criminal trial in New York.

Read full article »

Ex-Abbott Labs Worker Gets 2nd Shot At Discrimination Claim

Abbott Laboratories must face discrimination claims from an ex-employee who says she was evaluated more harshly and assigned a much larger workload than her younger, white male colleagues, an Illinois appellate court ruled Tuesday.

Read full article »

EEOC Slaps Colo. Chili's With Bias Suit Over Sex Harassment

The U.S. Equal Employment Opportunity Commission has sued Brinker Restaurant Corp., which does business as Chili's Grill & Bar, in Colorado federal court, seeking to correct what it says are unlawful employment practices on the basis of sex and retaliation.

Read full article »

Hispanic Ex-Chipotle Workers Seek Cert. In Bias Suit

Three former Chipotle employees who accuse the restaurant chain of requiring workers to speak only English in the Mexican-themed establishments asked a California federal judge to grant them class certification in their harassment and discrimination suit.

Read full article »

MLB Says Umpire Can't Discuss Racial Bias Suit With Media

Major League Baseball is asking a New York federal court to deny an umpire’s motion for clearance to speak with the media about his racial discrimination claims against the league, saying the court can’t judge if his statements cross a legal line until he says them.

Read full article »

WAGE & HOUR

Great American Gets Nod On $1.25M Deal In Agent Pay Suit

Great American Financial Resources insurance agents could be reimbursed for allegedly unpaid commissions under a $1.25 million settlement given initial approval Tuesday by a federal court in Cincinnati.

Read full article »

LABOR

NLRB Ignored Motive In Health Co.'s Union Row, 3rd Circ. Told

A New Jersey health care facility struck back Wednesday at the National Labor Relations Board's finding that it improperly withheld benefits from workers mulling unionization, telling the Third Circuit that the board failed to follow a U.S. Supreme Court directive to examine the employer's motives before reaching such a conclusion.

Read full article »

TRADE SECRETS

Ex-Workers Took Trade Secrets To Ernst & Young, Suit Says

Orrick Herrington
Peiffer Wolf
Podhurst Orseck
Potter Anderson
Proskauer Rose
Quinn Connor
Quinn Emanuel
Ropes & Gray
Sanford Heisler Sharp
Schneider Wallace
Shindler Anderson
Skadden
Smith Villazor
Squire Patton Boggs
Swanson Martin
Thompson & Knight
Villegas Carrera
White & Case
Willkie Farr
WilmerHale

COMPANIES

AAR Corp.
Abbott Laboratories
Academy Mortgage Corp.
Alpha Natural Resources, Inc.
Amazon.com Inc.
American Federation of Labor and Congress of Industrial Organizations
Association of American Railroads
BNSF Railway Co.
Chipotle Mexican Grill Inc.
Elliott Management Corp.
Ernst & Young
Facebook
Gilead Sciences Inc.
Great Dane Trailers Inc.
Hertz Global Holdings Inc.
LinkedIn Corp.
Major League Baseball Inc.
Miramax Film Corp.
New York University
Northeastern University
Northern Mariana Islands Retirement Fund
Service Employees International Union
StubHub Inc.
Twitter Inc.
U.S. Chamber of Commerce
United Steelworkers
Wynn Resorts Ltd.
eBay Inc.

Two men who worked for the U.S. arm of a global environmental and engineering consulting firm accessed and stole its trade secrets to benefit their new jobs at Ernst & Young, according to an Illinois state court suit filed Monday.

Read full article »

Gov't Can't Slip $63M Suit Alleging It Stole Inventor's Software

The federal government must face claims a U.S. Department of Defense agency ripped off a former defense contractor employee's copyright for his software, the U.S. Court of Federal Claims has ruled, saying the inventor's case overcomes an obscure jurisdictional statute.

Read full article »

EXECUTIVE COMPENSATION

Ex-Hertz CFO Makes Chancery Bid For Legal Fee Coverage

The former chief financial officer of car rental company The Hertz Corp. asked a Delaware Chancery Court judge to affirm her right to have her legal defense fees covered by her former employer as it tries to claw back her pay based on negligence and misconduct allegations.

Read full article »

WORKER SAFETY

Feds Reach $550K Deal With Wife Of W.Va. Mine Victim

A widow of one of the 29 West Virginia miners killed in a 2010 explosion on Wednesday asked a federal court to approve a settlement requiring the government to pay $550,000 to end allegations it didn’t do enough to prevent the disaster.

Read full article »

PEOPLE

Ex-Proskauer Tax Atty Joins Brown Rudnick’s Tax Group

Brown Rudnick LLP has announced that a former Proskauer Rose LLP attorney has joined the firm as a partner in its tax practice group based in New York.

Read full article »

EXPERT ANALYSIS

More DOL Letters Needed For Clarity On Enforcement Strategy

The U.S. Department of Labor recently issued a trio of opinion letters offering employers guidance on implementing the Family and Medical Leave Act and the Fair Labor Standards Act, but they offer little insight on the DOL's overall approach to enforcement, say Laura Lawless Robertson and Melissa Legault of Squire Patton Boggs.

Read full article »

The Important Reasons DOJ Wants To Toss Gilead FCA Case

False Claims Act defendants’ ears should be all perked up since last week’s U.S. Department of Justice motion to dismiss Gilead v. U.S., as it is based on the frequent defense argument that the FCA wasn’t intended to allow relators to second-guess regulatory decision-making, says Derek Adams of Feldesman Tucker.

Read full article »

LEGAL INDUSTRY

Kavanaugh's Law School Gig Faces Student Backlash

Students at George Mason University are demanding that the school reverse its decision to hire U.S. Supreme Court Justice Brett Kavanaugh as a law

GOVERNMENT AGENCIES

Defense Contract Management Agency
Delaware Court of Chancery
Equal Employment Opportunity Commission
Federal Aviation Administration
Federal Bureau of Investigation
Food and Drug Administration
Massachusetts Gaming Commission
Mine Safety and Health Administration
National Labor Relations Board
Securities and Exchange Commission
Solicitors Regulation Authority
U.S. Attorney's Office
U.S. Department of Defense
U.S. Department of Justice
U.S. Department of Labor
U.S. Supreme Court
United States Court of Appeals for the Third Circuit
United States District Court for the Southern District of New York

school lecturer this summer in light of decades-old sexual misconduct claims against him that surfaced during his confirmation hearing.

Read full article »

Senate Rules Axed To Speed Judicial, Administration Picks

Senate Republicans voted to ax the chamber's nominee debate rules Wednesday, potentially opening the floodgates for dozens of President Donald Trump's trial judge and lower-level administrative nominees to be confirmed.

Read full article »

Stars, BigLaw Atty Make 'Varsity Blues' Court Debut

Hollywood stars Lori Loughlin and Felicity Huffman, along with ex-Willkie Farr & Gallagher LLP co-chair Gordon Caplan, faced a federal judge for the first time Wednesday after being charged in the "Varsity Blues" college admissions scandal, attracting a crush of media and autograph-seekers to the waterfront Boston courthouse.

Read full article »

Court Staffer's Happy Hour Sparks Recusal Bid

A Georgia man has asked a state court judge to remove herself from his divorce case, saying a member of the judge's staff never disclosed that she attends a monthly happy hour with a lawyer at the firm representing his ex-wife, even when she was asked.

Read full article »

Amazon Atty Joins StubHub As New General Counsel

StubHub has snagged former Amazon attorney Stephanie Burns to be its new vice president and general counsel, the online ticket exchange company announced Wednesday.

Read full article »

Interview

Law Firm Leaders: Bryan Cave's Mayhew And Pritchard

Wednesday marks the one-year anniversary of the transatlantic merger that formed Bryan Cave Leighton Paisner. The law firm's top leaders, Therese Pritchard and Lisa Mayhew, sat down recently with Law360 to chat about the combination and the law firm's future.

Read full article »

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: States Push Worker Classification Changes
Date: Thursday, April 4, 2019 7:10:09 AM

What you need to know to start your day.

States Push Worker Classification Changes

By Patricio Chile

Tennessee is the latest state to take on worker classification legislation, with a bill moving through the state legislature now that would tilt the question of worker classification in favor of employers who might want to classify certain workers as independent contractors. If enacted, the state would replace the three-part "ABC test" that many states use when classifying workers, Chris Marr reports in "States of Work."

- **Pushing Changes:** Indiana's legislature last month sent Gov. Eric Holcomb (R) legislation that would classify "direct sellers" as independent contractors. That follows a push from the Direct Selling Association, a trade group for **multilevel marketing** companies such as Amway and Mary Kay, to change state employment laws to limit some worker classification lawsuits.

- **California Trucking:** Last week, a federal judge quashed a challenge by a **trucking association** to last year's California Supreme Court ruling that changed how courts there distinguish between employees and independent contractors.

Empty boxes move along a conveyor belt to be filled with orders at the Mary Kay Inc. regional distribution facility in Dallas, Texas, Aug. 6, 2013.
Photographer: T.J. Kirkpatrick/Bloomberg

MORE PLANS COVER TRANSGENDER SURGERY

Women who need a hysterectomy typically have insurance to cover the cost of the procedure. Women who need a hysterectomy as part of gender reassignment surgery, however, can be on the hook for thousands of dollars. But that's changing as litigation forces more employer-sponsored health plans to stop excluding coverage for gender-confirming surgery.

- **Illegal Bias:** Transgender patients' lawsuits are succeeding under theories that employers are violating **Title VII's** ban on workplace discrimination and Obamacare's prohibition of health-care discrimination.

- **Changing Laws:** The American Medical Association considers **gender dysphoria** treatment a medical necessity, and states are starting to pass laws that prohibit insurers from denying coverage, Mary Ann Pazanowski reports.

WHAT ELSE WE'RE WATCHING

- **Pay Data:** Employers with 100 or more workers will have to turn over 2018 **worker pay data** to the Equal Employment Opportunity Commission, but they have until Sept. 30 to do so, the agency told a federal judge. Paige Smith has the story.

- **Retaliation Claims:** A former advocacy director for **Amnesty International USA** is challenging his firing that occurred just months after the human-rights organization threatened retaliation against him for helping to organize a petition to pay interns. A federal administrative judge said last month that those threats violated U.S. labor law. Hassan Kanu has the story.

- **Federal Workers:** The Trump administration wants a federal appeals court to overturn a ruling striking down portions of **executive orders** that made it easier to fire federal employees, required agencies to review labor agreements for cost savings, and restricted time on the job for union work. A three-judge panel will hear arguments today.

- **Acosta Hearing:** House Democrats pressed Labor Secretary Alexander Acosta on a proposed 10 percent cut to the agency's budget, recent controversial regulatory proposals, and a decade-old plea deal in which Acosta allegedly helped sex offender **Jeffrey Epstein** skirt harsh punishment. Jaclyn Diaz and Tyrone Richardson have the story.

- **Gender Bias:** Jones Day has been caught in the wave of gender bias allegations against premier law firms after six women filed a lawsuit accusing it of **systemic discrimination** against its female associates, Robert Iafolla and Porter Wells report.

- **OSHA Forum:** A Democratic-sponsored Capitol Hill forum on the current Occupational Safety and Health Administration, with three former Obama **OSHA officials** among the speakers, is set for this morning.

- **Jobless Claims:** The Employment and Training Administration issues its weekly **jobless claims** report at 8:30 a.m.

PRACTITIONER INSIGHTS

How Women Leaders Bridged the Atlantic and Created a Mega Firm
Last year, the **Bryan Cave Leighton Paisner** merger attracted attention not only because it was a major transatlantic BigLaw deal but also because it was the first one to be successfully negotiated by two women. The co-chairs, Lisa Mayhew and Therese Pritchard, review how they found success.

DAILY RUNDOWN

Top Stories

Insulin-Dependent Bus Mechanic Gets Trial Over Need to Drive
A trial is necessary to determine whether a Pennsylvania transit agency violated a mechanic's job rights when it fired him after his diabetes became insulin dependent, a federal judge ruled.

Lawyer's Mistake No Reason to Revive Postal Worker's Bias Suit
A Pittsburgh mail carrier was too late to sue the U.S. Postal Service for withdrawing his job accommodation for his stroke-related climbing restrictions, the Eleventh Circuit said.

Los Angeles Plan for Fully Paid Parental Leave Gets Council OK
Los Angeles City Council members unanimously approved a plan to augment existing state funding for paid parental leave to establish up to 18 weeks of fully paid leave for new parents.

Discrimination

MLB Fires Back at Umpire Who Wants to Speak Publicly About Bias
A Major League Baseball umpire has no legal basis for a court order allowing him to speak publicly about the job bias he's allegedly faced, the league says.

Wage & Hour

Motel 6 Wage Suit Sent Back to California State Court

A lawsuit accusing Motel 6 of employment law violations will be moved back to a California state court, a federal court said April 2.

Kentucky Exotic Dancer Avoids Arbitration of Wage Claim
An exotic dancer at a gentleman's club in Kentucky doesn't have to arbitrate her wage claims against the club, a federal district court said.

Harassment & Retaliation

Ex-NFL Official Alleges Retaliation Over Fraud Claims
The National Football League and a non-profit sports organization retaliated against a long-time referee for reporting financial irregularities by a chapter of the Texas Association of Sports Officials, a new lawsuit alleges.

State & Local Laws

Catholic School Challenges Cleveland Suburb's Ban on Gender Bias
A Catholic high school has brought a constitutional challenge to an Ohio city ordinance barring discrimination in employment and public accommodations based on sex, sexual orientation, or gender identity.

Salary History Queries New No-No for North Carolina Agencies
North Carolina agencies are barred from asking job applicants about their salary histories under a new executive order.

Immigration

Big Immigration Impact Could Come From Modest Deficit Proposal
A line item tucked away in the fiscal year 2020 budget proposal could have an impact far beyond the deficit reduction

WORKFLOWS

Cooley added tax lawyer Jeffrey Tolin as a partner in New York from Hogan Lovells | **McGuireWoods** hired Deepak Reddy as a partner in New York from Winston & Strawn | **Ballard Spahr** has rehired Kim Phan to the firm's Privacy and Data Security Group in Washington, DC | **Ogletree Deakins** said that Lucie Guimond will join the firm as a partner in Montréal | **Orrick** announced that Vincent Casey has returned to the firm's Energy & Infrastructure Group in New York from Ashurst | **Littler** added Megan I. Brennan as of counsel to

Minneapolis from Cargill | **Eversheds Sutherland** announced that Eric J. Coffill has returned as senior counsel to the State and Local Tax (SALT) Practice in Sacramento | **Blank Rome** added partners Mitchell M. Brand and Harris J. Diamond to the Finance, Restructuring, and Bankruptcy group in New York from Stradley Ronon Stevens & Young, LLP | **Greenspoon Marder** added Germain D. Labat as a partner in the Litigation group in Los Angeles from Vedder Price, and Lauren A. Galvani as a partner to the Wills, Trusts & Estates practice in Boca Raton | **Alston & Bird** hired senior trial attorney Terance "Tery" Gonsalves as a partner in Atlanta from Steptoe & Johnson LLP | **Dykema** said that Thomas H. Hutchinson rejoined its Litigation Department in Los Angeles from Veatch Carlson | **Winston & Strawn** added Jason Goldstein as a partner in New York from DLA Piper

For all of today's Bloomberg Law headlines, visit Daily Labor Report

From: Nixon-Jackson Thetis
Subject: Legal News FYI 04-04-19
Date: Thursday, April 4, 2019 9:46:54 AM

Thursday, April 4, 2019

Whether Revenge or #MeToo, Firing Shows Tensions at Rights Icon

BloombergLaw - Daily Labor Report 04 Apr 2019 06:36

Sexual Harassment • Middle East advocacy director fired over accusation of sexual misconduct • Raed Jarrar says Islamophobia, racism to blame By Hassan A. Kanu A former advocacy director for Amnesty International USA is challenging his firing that...

United States: NLRB's Division Of Advice Gives "Advice" As To The Application Of Boeing — When A Work Rule/Employment

Mondaq Business Briefing 04 Apr 2019 03:33

In The Boeing Company, 365 NLRB No. 154 (2017), the National Labor Relations Board (NLRB) reassessed the standard it would apply when determining the facial validity of otherwise neutral work rules based upon a balancing between a given rule's negative...

Faculty braces for Pitt's union "stalling tactics"

University of Pittsburgh Pitt News (Pittsburgh, PA) 04 Apr 2019 01:25

Wi h at least six months until Pitt organizers' third attempt at a faculty union elec ion, Pitt administration and faculty are deep in a debate over the merits of unionization — something Provost Ann E. Cudd has discussed since her first mon h on the...

NLRB Ignored Motive In Health Co.'s Union Row, 3rd Circ. Told

Kirkland & Ellis Law360 03 Apr 2019 21:37

By Jeannie O'Sullivan Law360, Philadelphia (April 3, 2019, 5:40 PM EDT) -- A New Jersey health care facility struck back Wednesday at the National Labor Relations Board's finding that it improperly withheld benefits from workers mulling unionization,...

DOL Proposes Revisions to Joint Employer Regulations

JD Supra Law News 03 Apr 2019 18:30

On April 1, 2019, the Department of Labor announced a Notice of Proposed Rule Making (NPRM) for Part 791 of Ti le 29 of the Code of Federal Regulations for the Fair Labor Standards Act hat will " revise and clarify the responsibilities of employers and...

Can an Airport Skycap's Complaint About the Poor Tipping Habits of French Soccer Players Really Become a

JD Supra Law News 03 Apr 2019 14:45

Yes! One of the least appreciated federal workplace laws is Section 7 of the National Labor Relations Act, the 1935 law which gives most private sector employees in the U.S. the right to form and join unions. Section 7 of the Act, which applies wi h...

U.S. DOL Unveils New Proposed Joint Employer Test

National Law Review 03 Apr 2019 14:41

Article By On April 1, 2019, the U.S. Department of Labor ("DOL") announced proposed changes to its joint-employer test. Specifically, the DOL set out a four-factor balancing test, which inquires whether an entity that does not directly employ an...

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Kushner works on legal immigration — DHS carries out biggest worksite raid in more than 10 years — EEOC sets September pay reporting deadline
Date: Thursday, April 4, 2019 10:03:52 AM

View online version

2018 Newsletter Logo: Morning Shift

04/04/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Daniel Lippman and Ted Hesson

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— Jared Kushner is working to expand legal immigration.

— DHS carried out its biggest worksite raid in more than a decade.

— **EEOC set a September deadline for payroll breakdowns by race, ethnicity, and gender.**

GOOD MORNING! It's Thursday, April 4, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

KUSHNER'S IMMIGRATION PLAN: While President Donald Trump threatens to shut down the southern border, his son-in-law and senior adviser Jared Kushner is working to expand some forms of legal immigration, POLITICO's Anita Kumar reports. Kushner's plan "could increase the number of low- and high-skilled workers admitted to the country annually," but he's "being urged to offset those gains with reductions in other forms of legal immigration." The likely targets would be what Trump calls "chain migration," in which immigrants bring in family members, or the diversity visa lottery. More here.

ICE RAID: "Federal immigration officials arrested 280 workers Wednesday at a consumer electronics repair company in Allen, Texas," reports POLITICO's Ted Hesson, in the biggest DHS raid in more than a decade. ICE officials "said the operation — which also targeted four related staffing companies — began after the agency's investigative arm found irregularities in the company's I-9 employee forms, which are used to verify work authorization." Anyone found to be living in the U.S. illegally, ICE said, will be "fingerprinted and processed for removal from the United States." More here.

VISA UPDATE

DHS NEARLY DOUBLES H-2B VISAS FOR SUMMER: DHS will nearly double

the number of H-2B visas allocated through September, making an additional 30,000 available, according to statements issued by Rep. Andy Harris (R-Md.) and Sen. Susan Collins (R-Maine). The H-2B program issues 66,000 visas annually, but Congress grants DHS the option to issue up to roughly 69,000 more as circumstances warrant.

A DHS official confirmed to Morning Shift that DHS and DOL will make the additional 30,000 visas available, but said they'll be available only to "returning workers." The agencies plan to publish a temporary final rule in the Federal Register with more details on eligibility and filing requirements.

SEPT 30 DEADLINE FOR EEO-1 GENDER, RACE REPORTING REQUIREMENTS: Businesses with 100 or more employees will be required to submit pay data broken down by race, ethnicity, and gender to the EEOC by September 30, according to an update filed by the government in federal court late Wednesday. Obama-era requirements for certain employers to provide the EEOC with expanded demographic information were reinstated by a DC federal court in March.

The March 4 order came just weeks before a May 31 deadline, and the judge wasn't pleased to learn that the agency didn't move quickly to alert businesses to the reinstated requirements. She directed EEOC to give her a clear timeline by Tuesday. Read the government's filing here.

DREAMERS IN CONGRESS: On Wednesday, presidential candidate Sen. Kamala Harris introduced a bill with Sens. Dick Durbin (D-Ill.) and Catherine Cortez Masto (D-Nev.) that would permit Dreamers to work as staffers or interns in Congress, POLITICO's Marianne LeVine and Christopher Cadelago report. "It's the latest move by the California Democrat to seize on an issue that her rival Beto O'Rourke has made his calling card — and to advocate for a Democratic constituency that's often reduced to a congressional bargaining chip," they write. More here.

UNIONS

BUZZFEED UNION SAYS MANAGEMENT STOOD IT UP: The BuzzFeed News Union said on Twitter that a three hour meeting scheduled with BuzzFeed's HR and legal teams was canceled abruptly on Wednesday, and that management "is engaging in clear union-busting."

"This meeting was a crucial opportunity to make progress in agreeing on a bargaining unit, after more than 7 weeks of frustratingly slow communication with BuzzFeed," the union said in an email to staff. BuzzFeed News's staff formed a union with the NewsGuild of New York in January. "BuzzFeed has made specific, reasonable offers (and concessions) with the goal of voluntarily recognizing a BuzzFeed News union," a spokesperson for BuzzFeed News told Morning Shift.

NOMINATIONS

MCCONNELL MOVES TO SPEED UP NOMINATIONS: "Senate Republicans used the 'nuclear option' Wednesday to unilaterally reduce debate time on most presidential nominees, the latest in a series of changes to the fabric of the Senate to dilute the power of the minority," POLITICO's Burgess Everett reports. Only 50 percent of DOL's political appointees have been confirmed, according to a tracker compiled by the Washington Post and Partnership for Public Service. At DHS, it's only 56 percent.

BUSINESSES URGE MCCONNELL TO CONFIRM EEOC MEMBER: More than two dozen business groups, including, the Chamber of Commerce, the National Restaurant Association, and the International Franchise Association, wrote Mitch McConnell Wednesday urging him to confirm Janet Dhillon for a seat on the Equal Employment Opportunity Commission. The agency's lack of a quorum, they wrote, has prevented it from moving forward on regulatory matters.

Dhillon was cleared by the Senate HELP committee in February. Her confirmation would allow the EEOC to function for the first time since early January, when Sen. Mike Lee (R-Utah) blocked a confirmation vote on an additional term for Chai Feldblum, who occupies one of the agency's Democratic seats. Read the letter here.

WORKER SAFETY

SWINE SAFETY: "The Trump administration plans to shift much of the power and responsibility for food safety inspections in hog plants to the pork industry as early as May, cutting the number of federal inspectors by about 40 percent and replacing them with plant employees," Kimberly Kindy reports for The Washington Post. The proposal would also eliminate caps on slaughter-line speeds in those plants. Sen. Dick Durbin (D-Ill.), sent a letter signed by 16 other Democrats to the USDA inspector general's office late last month, asking for an investigation into the rulemaking, citing concerns that the agency didn't analyze worker safety risks adequately.

"Using flawed data, the USDA is rushing to approve a rule concerning slaughter rates on hog farms, and it could jeopardize worker safety for a job that already comes with considerable risks and dangers," Durbin said in a statement to the Post. "The safety of tens of thousands of workers in pork processing plants should be USDA's priority, and right now it clearly isn't." Read Durbin's letter here. More from the Post here.

ACOSTA PUSHES BACK ON EPSTEIN PLEA DEAL: Labor Secretary Alexander Acosta defended his 2008 plea agreement with billionaire pedophile Jeffrey Epstein on Capitol Hill Wednesday, pushing back on Democrats' assertions that he let Epstein off too easy when he was U.S. attorney for southern Florida, POLITICO's Ian Kullgren reports.

"At the end of the day Mr. Epstein went to jail," Acosta said. "Mr. Epstein was incarcerated, he registered as a sex offender, the world was put on notice that he was a sex offender, and the victims received restitution." It was the first time that Acosta commented on the matter since a federal judge ruled in February that Acosta's failure to notify Epstein's victims of the plea deal before it was finalized violated the 2004 Crime Victims' Rights Act. When asked by Rep. Katherine Clark (D-Mass.) whether he could still lead the Labor Department in light of the controversy, Acosta sat in stunned silence for several seconds."Is that a question?**"** he said finally. More here.

INSIDE THE AGENCIES

DHS MOVES: Chip Fulghum has left DHS, where he was deputy undersecretary for management. He is now COO of Endeavors, a San Antonio-based nonprofit.

"The departure is the latest of several within DHS leadership in recent months," POLITICO's Ted Hesson reported . "More than two years into the Trump administration, numerous top roles remained filled by acting officials."

Chad Mizelle is now deputy general counsel at DHS. He most recently served as associate counsel to the president at the White House. His first day at DHS was Monday, March 25.

CASSIDY AND SINEMA PARTNER UP ON PAID LEAVE: Sen. Kyrsten Sinema (D-Ariz.) has signed onto a paid parental leave proposal sponsored by Sen. Bill Cassidy (R-La.) that would fund paid leave for new parents but not for family medical emergencies, POLITICO's Ian Kullgren reports. "Kyrsten and I just spoke this past week, and she has just committed," Cassidy said Wednesday. But the omission of family emergency coverage could prevent additional Democratic support. More from Kullgren here.

COFFEE BREAK

— "Biden pledges in video to be more 'respectful' of personal space," from POLITICO

— "Ex-UAW Vice President Norwood Jewell pleads guilty in training center scandal," from The Detroit Free Press

— "U.S. Private Sector Added 129,000 Jobs in March," from The Wall Street Journal

— "Court rejects trucking group's challenge to independent contractor ruling," from The San Francisco Chronicle

— "Beyond the straight and narrow: Tech sector pushed to accommodate those who reject strict gender norms," from The Boston Globe

— "Chicago symphony, striking musicians to restart negotiations," from The Associated Press

— "America's Biggest Economic Challenge May Be Demographic Decline," from The New York Times

THAT'S ALL FOR MORNING SHIFT!

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To: Ring, John
Subject: Daily Labor Report Highlights
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Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Divide Between Employers, Worker Advocates Widens Over Pay Data

By Paige Smith and Hassan A. Kanu

An Equal Employment Opportunity Commission update to a federal judge further split employers and worker advocates over the hotly debated incorporation of pay data into an annual workforce data report submitted to the agency.

Validity of Coca-Cola Bottler's Arbitration Pact Up to Jury

By Patrick Dorrian

A jury must decide whether a maintenance mechanic at a Coca-Cola bottling plant in Texas needs to arbitrate his job bias claims, a federal judge ruled.

General Dynamics Settles Dispute With Medicare Call Center Staff (2)

By Madison Alder and Chris Opfer

A General Dynamics Corp. subsidiary April 4 agreed to settle claims that the federal contractor threatened workers trying to unionize Medicare and Obamacare call centers.

Revenge or #MeToo: Firing Exposes Rift at Rights Icon Amnesty

By Hassan A. Kanu

A former advocacy director for Amnesty International USA is challenging his firing that occurred just months after the human-rights organization threatened retaliation against him for helping to organize a petition by unpaid interns. A federal administrative judge concluded last month that those threats violated U.S. labor law.

DISCRIMINATION

Lactating Worker May Not Have Settled Her Job Bias Claims

By Patrick Dorrian

A Texas woman can pursue a lawsuit alleging her employer discriminated and retaliated against her when she returned from maternity leave and took lactation breaks, a federal judge ruled.

Arbitrator Must Rule on Validity of Disability Claims

By Christopher Brown

Whether a Missouri worker must arbitrate his disability discrimination claims must be decided by an arbitrator, the state court of appeals ruled.

WAGE & HOUR

Sun-Maid Worker's Break Suit Straddles State, Federal Courts

By Fatima Hussein

Attorneys for Sun-Maid Growers of California and a worker who claims the company failed to provide meal and rest breaks are battling over whether the worker's claim will be heard in state or federal court.

Judge Swats Away Bimbo Bakeries' Defense Moves in OT Suit

By Porter Wells

Bimbo Bakeries USA Inc. lost its bid to pursue an unjust enrichment counterclaim against a group of delivery drivers who say the company misclassified them as independent contractors and owes them overtime compensation.

Target Boosts Its Minimum Starting Wage as War for Workers Rages

By Matthew Boyle

Target Corp. is boosting its minimum starting wage for the third time in as many years, distancing itself from rival Walmart Inc. in a tight labor market.

HARASSMENT & RETALIATION

Apache Corp. Paralegal Has Age, Sex-Based Retaliation Win Upheld

By Patrick Dorrian

Evidence supports a state jury's finding that Apache Corp. retaliated against a paralegal because she complained about sex and age discrimination at the Houston-based oil and gas company, the Texas Court of Appeals ruled April 4.

STATE & LOCAL LAWS

California 'Walk Time' Case Arguments: To Pay or Not to Pay

By Joyce E. Cutler

California Supreme Court justices sounded skeptical of arguments by the state that lawmakers intended for thousands of state correctional workers to go unpaid for the chunk of time it takes them to walk from the prison doors to their assigned posts.

Gender Wage Gap Targeted as Colorado Senate Passes Pay Bill

By Tripp Baltz

The Colorado Senate approved a bill taking aim at gender-based pay disparities.

States of Work: Tennessee May Switch Worker Classification Tests

By Chris Marr

Dive into this week's "States of Work" roundup of state and local labor and employment developments. This week, Illinois lawmakers move toward setting nurse staffing requirements, and Arkansas considers providing special leave for firefighters who are diagnosed with cancer.

LABOR RELATIONS

Justices Urged Not to Review Minnesota Union Representation Cases

By Michael J. Bologna

Minnesota Attorney General Keith Ellison called on the U.S. Supreme Court to deny review of litigation involving unions' authorities to provide exclusive representation for public-sector bargaining units.

LEGAL PRACTICE

Ninth Circuit Nominees Advance Over Democrat Objections

By Patrick L. Gregory

President Donald Trump is closer to filling two vacancies to an appeals court he has vilified, with nominees fiercely opposed by Democrats.

IMMIGRATION

ICE Raids Texas Company, Arrests 280 Undocumented Workers (1)

By Laura D. Francis

More than 280 people were arrested on administrative charges of working unlawfully at a telecommunications equipment repair business in north Texas April 3.

HEALTH CARE & BENEFITS

Sex-Transitioning Workers Sue for—and Win—Employer Plan Coverage

By Mary Anne Pazanowski

Transgender people increasingly are suing their employers to get back thousands of dollars they've been forced to spend out-of-pocket for gender transition-related care.

CenturyLink Blasts 401(k) Fund Challenge in Would-Be Class Suit

By Jacklyn Wille

A proposed class action targeting a fund in CenturyLink's 401(k) plan is an improper hindsight-based challenge that must be dismissed, the company told a federal judge.

Chamber Rolls Out Small Business Health Plan Tool Despite Ruling

By Madison Alder

The U.S. Chamber of Commerce has launched a tool to help people find health insurance offered through President Donald Trump's expanded version of small business health plans, undeterred by a court loss striking parts of the rule creating the plans.

SAFETY & HEALTH

Miner's Family Reaches $550K Deal Over Agency's Role in Death

By Sam Pearson

The family of a coal miner killed at the Upper Big Branch Mine explosion in 2010 will be paid $550,000 to resolve her claims that the Mine Safety and Health Administration bore responsibility for his death.

ALSO IN THE NEWS

California, Two Other States Challenge Trump's Deregulation Plan

By Andrew Harris and Kartikay Mehrotra

California, Oregon and Minnesota have sued President Donald Trump and several top cabinet officials over the administration's requirement that federal agencies delete two regulations for each new one they add.

Judges Question Arguments for Overturning Decision on Fed Orders

By Louis C. LaBrecque

A three-judge panel appeared skeptical during an April 4 hearing of arguments from the Trump administration that they should overturn a lower court's ruling striking down significant portions of three executive orders affecting the federal workforce.

U.S. Jobless Claims Fall to 49-Year Low, Below All Forecasts

By Katia Dmitrieva

Filings for U.S. unemployment benefits unexpectedly fell, dropping to the lowest since December 1969, as the labor market tightened further.

Risk of Another Ugly U.S. Jobs Report Is Keeping Investors Wary

By Katia Dmitrieva, Emily Barrett and Reade Pickert

Investors were on edge a year ago for signs the U.S. labor market was overheating. Now they're primed for the opposite.

Nomura Job Cuts Begin as CEO Unveils Plan to Save $1 Billion (2)

By Takashi Nakamichi, Donal Griffin and Chanyaporn Chanjaroen

Nomura Holdings Inc. unveiled plans to cut $1 billion of costs at its struggling investment bank, firing dozens and pulling back from businesses as it embarks on yet another sweeping overhaul of its international operations.

PRACTITIONER INSIGHTS

INSIGHT: How Women Leaders Bridged the Atlantic and Created a Mega Firm

Last year, the Bryan Cave Leighton Paisner merger attracted attention not only because it was a major transatlantic BigLaw deal but also because it was the first one to be successfully negotiated by two women. The co-chairs, Lisa Mayhew and Therese Pritchard, review how they found success.

LATEST CASES

Case: Wage & Hour/Overtime Exemption (S.D. Fla.)

A jury's finding that a logistic coordinator for a Florida tuna company was properly classified as an overtime-exempt administrative employee was supported by the evidence presented at trial, because her own testimony reflected that she was a central component of the company's managerial operations, and that her tasks went beyond clerical duties, including receiving loads of fish, filing customs paperwork, and arranging shipment of the fish to customers. The case is Pineda v. Pescatlantic Grp., LLC, 2019 BL 118763, S.D. Fla., No. 16-25291-Civ-TORRES, 4/3/19.

Case: Discrimination/Retaliation (Tex. App., 14th Dist.)

A female paralegal in Texas was entitled to judgment on her claim that she was fired in retaliation for her age and gender discrimination complaints, because there is sufficient evidence that younger and male colleagues were promoted—while other older and female employees were not—to support her reasonable belief that discrimination had occurred when she made her complaint, and she was fired just seven weeks later. Moreover, her boss shunned her after she filed her complaint and disproportionately disciplined her for working overtime without permission, and he gave conflicting reasons for firing her, the court said. The case is Apache Corp. v. Davis, 2019 BL 119750, Tex. App., 14th Dist., 14-17-00306-CV, 4/4/19.

Case: Wage & Hour/Arbitration (W.D.Wash.)

United Rentals and one of its delivery drivers, who says the company violated his rights under state and federal wage laws, must move their dispute as to whether the driver's claim is subject to an arbitration agreement to a

Connecticut federal court in accordance with the agreement's forum-selection clause, because the clause clearly states that a Connecticut court is the exclusive forum for interpretation or enforcement of the agreement, and the issue of whether the driver's claim is arbitrable requires interpretation of the agreement. The case is Powell v. United Rentals (N. Am.), Inc., 2019 BL 119258, W.D. Wash., No. C17-1573JLR, 4/3/19.

Case: Disability Discrimination/Equitable Tolling (3d Cir.)

A U.S. Postal Service employee's tardiness in suing for disability bias bars his lawsuit challenging the administrative denial of his claim, even though his lawyer mistakenly filed an administrative appeal with the wrong office for federal employees and incorrectly assumed that the filing would be sent to the correct office. Neither the employee nor the lawyer followed up after learning of the correct procedure and waited a year, well outside the limitations period, before filing his lawsuit, so the doctrine of equitable tolling that would have excused the mistake doesn't apply, the court ruled. The case is Komosa v. USPS, 2019 BL 119675, 3d Cir., 17-2640, unpublished 4/3/19.

Case: Discrimination/Forum Selection Clause (Cal. Ct. App., 1st Dist.)

A fired California worker must litigate his California Fair Employment and Housing Act claims against Ryze Claim Solutions in Indiana pursuant to the forum-selection clause in his employment agreement, because the California Labor Code provision prohibiting forum-selection clauses in employment contracts did not go into effect until January 1, 2017, and even though he was fired after that date in 2017, the last time his employment agreement with Ryze was updated or renewed was in May 2016. The case is Ryze Claim Sols. LLC v. Superior Court of Contra Costa Cty., 2019 BL 118550, Cal. Ct. App., 1st Dist., No. A155842, 4/3/19.

Case: Discrimination/Waiver (N.D. Tex.)

A former talent development specialist for Arbor E&T in Texas may go to trial on whether she gave up her right to pursue her Title VII gender discrimination lawsuit when she agreed to a settlement waiving all claims that arose from her complaints against the company that she filed with the Department of Labor's Wage and Hour Division. The court said that the settlement agreement and the

receipt interpreting it only identified waiver of Fair Labor Standards Act and Family and Medical Leave Act claims, and both parties knew that the DOL-WHD only had jurisdiction over FLSA claims and that she had pending EEOC charges, so it isn't clear that she meant to release her Title VII claims as well. The case is Pattillo v. Arbor E&T, LLC, 2019 BL 118283, N.D. Tex., No. 3:18-CV-1194-B, 4/3/19.

Case: Discrimination/Reduction in Force (E.D. Mich.)

A Chinese-American former vice-president of Global IT at Key Safety Restraint Systems in Michigan can go to trial on his claim that he was selected for a reduction in force based on his race, because his supervisor's frequent derogatory comments about people of Chinese ethnicity may show he was racially biased, and there is contradictory evidence as to whether that supervisor influenced the final decision-maker. Further, the court noted that his supervisor could not identify specific examples of his alleged performance deficiencies that led to his selection for the RIF. The case is Hong v. Key Safety Restraint Sys., Inc., 2019 BL 117793, E.D. Mich., No. 18-cv-10541, 4/3/19.

Case: Labor Relations/Public Employees (Pa. Commw. Ct.)

An arbitrator properly found that a Pittsburgh police officer's grievance challenging his non-selection for promotion wasn't arbitrable under Pennsylvania Act 111. The officer's union argued that the city failed to follow the statutory appointment procedure, but the arbitrator considered and rejected that argument, the promotion of policemen is a matter of management prerogative, and there is no indication that the city bargained away its discretion to select its employees. The case is Fraternal Order of Police v. City of Pittsburgh, 2019 BL 119791, Pa. Commw. Ct., 221 C.D. 2018, unpublished 4/4/19.

Case: Disability Discrimination/Arbitration (W.D. Tex.)

A disabled maintenance mechanic at a Coca Cola facility in Texas gets a jury to decide if he has to arbitrate his discrimination and retaliation claims, because his affidavit unequivocally denying that he saw, signed, or clicked on any dispute resolution agreement is enough to raise a factual issue as to

whether he agreed to arbitrate such employment-related claims, even though the company produced an admissible record indicating that he electronically signed the agreement. The case is Rosales v. Coca-Cola Sw. Beverages LLC, 2019 BL 119606, W.D. Tex., EP-18-CV-361-PRM, 4/3/19.

From:	Lucy, Christine B.
To:	Ring, John
Subject:	FW: Merit Promotions
Date:	Thursday, April 4, 2019 9:25:36 PM
Attachments:	Per-11 Merit Promotion Plan.pdf

Also for discussion.

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Cc: Tatum, James <James.Tatum@nlrb.gov>; Brennan, Robert J. <Robert.Brennan@nlrb.gov>
Subject: Merit Promotions

(b) (5)

(b) (5)

Thanks
Dave

	NATIONAL LABOR RELATIONS BOARD ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL	CHAPTER: PER-11 04-02-2003	REVISED DATE 12-1-2017
Subject:	MERIT PROMOTION PLAN		

SECTION

1. SUPERSEDED MATERIAL:

This supersedes the April 2, 2003 issuance of this chapter.

2. PURPOSE

This plan:

A. Establishes NLRB merit promotion policies.

B. Is established in compliance with the references listed above.

C. Establishes policies for promotion and other competitive placement actions for all positions within the National Labor Relations Board (NLRB), with the exception of positions in the Senior Executive Service (SES).

3. AUTHORITY

A. The authority for the establishment of this merit promotion plan is derived from Title 5 of the Code of Federal Regulations, Part 335, Promotion and Internal Placement (5 CFR 335.101-106). This Merit Promotion Plan is established to ensure a systematic means of selection for promotion based on merit in accordance with Title 5, United States Code, Section 2301, Merit Systems Principles (5 USC 2301) (Appendix A) and Section 2302, Prohibited Personnel Practices (5 USC 2302) (Appendix B).

B. The provisions in this Merit Promotion Plan are contingent upon fulfillment of the requirements of labor-management contracts and agreements between the agency and employee labor organizations representing bargaining unit employees. Existing negotiated agreements should be consulted for guidance covering topics not addressed in this plan. If there is an existing conflict between any provision of this Plan and any existing negotiated agreement between the agency and employee labor organizations representing bargaining unit employees, the provision of the negotiated agreement will prevail until such time as all appropriate labor obligations are fulfilled. Implementation of this plan with respect to employees represented by a labor organization is contingent upon satisfactory completion of appropriate labor relations obligations.

4. REFERENCE

- 5 USC § 2108 - Veteran; Disabled Veteran; Preference Eligible
- 5 USC § 2301 - Merit System Principles
- 5 USC § 2302 - Prohibited Personnel Practices
- 5 USC § 3319 - Alternative Ranking And Selection Procedures
- 5 CFR Part 315 - Career and Career-Conditional Employment
- 5 CFR Part 335 - Promotion and Internal Placement
- 5 CFR Part 575 - Recruitment and Relocation Bonuses; Retention Allowances.

5. APPLICABILITY

The provisions of this plan apply to all NLRB activities regardless of location.

6. GENERAL

The framework for NLRB and all Federal human resources is built on integrity and merit. In the area of merit promotion and internal placement, the objective of NLRB is to bring the best qualified candidates to the attention of management; to give employees an opportunity to receive fair and equitable consideration for higher level jobs; to incentivize employees to improve performance and develop their knowledge, skills and abilities and provide career opportunities for our employees.

Therefore all merit promotion and internal placement decisions in NLRB are bound by Merit System Principles (5 USC § 2301) and Prohibited Personnel Practices (5 USC § 2302).

This plan, along with the provisions of all applicable negotiated agreements, provides the basic framework, procedures and agency policy on merit promotion within NLRB.

7. EQUAL EMPLOYMENT OPPORTUNITY AND PROHIBITION OF DISCRIMINATION

A. It is the policy of the National Labor Relations Board (NLRB) and the Federal Government to provide equal employment opportunity to all individuals.

B. The NLRB supports the initiatives put forth in Executive Order 11478, as amended, which expressly prohibits discrimination based on sexual orientation and gender identity within executive branch civilian employment.

C. The above Executive Order also prohibits discrimination based on race, color, religion, sex, national origin, disability, parental status, and age.

8. REASONABLE ACCOMMODATION

- The NLRB provides for reasonable accommodations to applicants with disabilities.

- Employees who require reasonable accommodation are advised to notify the Office of Human Resources when applying for positions under this Merit Promotion Plan.

- Candidates who require reasonable accommodation and who are applying from outside NLRB should contact the individual listed on the vacancy announcement for assistance.

- Decisions on granting reasonable accommodation will be made on a case-by-case basis according to the provisions of the Americans with Disabilities Act of 1990.

9. POLICY

- It is the policy of NLRB to staff positions with the best-qualified candidates available through merit promotion procedures and to ensure, to the greatest extent possible, that employees have an opportunity to develop and advance to their full potential according to their capabilities and performance.

- This policy outlines competitive and non-competitive procedures to be used in selecting highly qualified individuals to fill vacancies on the basis of merit and without regard to sex, age, politics, religion, marital status, sexual orientation and gender identity, race, color, national origin, non-disqualifying handicapping condition, membership or non-membership in an employee organization, or on the basis of personal favoritism. Selection will be based solely on job related criteria.

- Promotions and related placement actions will also be made in accordance with this policy.

10. APPLICATION OF COMPETITIVE PROCEDURES

Actions Requiring Competitive Procedures:

1. Competitive procedures apply to the following actions:

   A. Permanent positions a higher-graded position or to a position with more promotion potential than any position previously held on a permanent basis in the competitive service.

   B. Reassignment, demotion, transfer, reinstatement, or other position change to a position with more promotion potential than any position previously held on a permanent basis in the competitive service, except as permitted by reduction-in-force (RIF) regulations.

   C. Time-limited (temporary) promotions exceeding 120 days (unless to a grade equal to or less than a grade previously held on a permanent basis). In computing the 120-day total, an individual's non-competitive temporary service in all higher graded positions during the preceding 12 months is counted, including details and other time-limited (temporary) positions.

   D. Details exceeding 120 days to higher graded positions or to positions with higher promotion potential. Prior service during the preceding 12 months under noncompetitive detail to higher graded positions and noncompetitive time-limited (temporary) promotions counts toward the 120-day total.

   E. Selection for formal training that is part of an authorized training agreement, part of a promotion program, or required by regulation before an employee may be considered for a promotion.

Actions Not Requiring Competitive Procedures

2. Competitive procedures do not apply to the following actions:

1. A promotion resulting from the upgrading of a position without significant change in the duties and responsibilities due to either the issuance of a new classification standard or the correction of a prior classification error.

2. Career promotion of employees when competitive procedures were held at an earlier date through appointment from an Office of Personnel Management (OPM) or delegated examining register, a direct hire authority, or competitive promotion procedures intended to prepare the employee for the position being filled. This includes any promotion up to and including the full performance level established for the occupation series.

3. A position changed permitted by reduction-in-force (RIF) procedures in Title 5 of the Code of Federal Regulations (CFR).

4. A promotion of an employee whose position is reclassified at a higher grade because of the performance of additional duties and responsibilities through accretion of duties or management action, planned or unplanned. A noncompetitive promotion via planned management action may be made only if the employee given the additional duties is the only person to whom they could logically be assigned. If there is more than one employee who could have been assigned the work, a noncompetitive promotion is NOT permitted. To be eligible for promotion under these circumstances, an employee must continue to perform the same basic functions and the duties of the former position must be absorbed administratively into the new one. When an additional position is created or when the new position is not a clear successor to the former position, a promotion may NOT be made using noncompetitive action. Accretion of duties actions cannot be used to promote an employee or team leader to a supervisory position. Promotions based on accretion of duties must be fully documented to show the circumstances that led to the action. Management retains the right to make any promotion under this provision a competitive action when competition is in the best interests of the NLRB.

5. Action involving statutory, regulatory, or administrative placement, to include actions directed as a result of arbitration decisions, court decisions of the Merit Systems Protection Board (MSPB), local settlements and discrimination complaint decisions.

6. A temporary promotion or detail to a higher graded position or to a position with known promotion potential for a period of 120 days or less. Prior service during the preceding 12 months under non-competitive temporary promotions and non-competitive details to higher graded positions counts toward the 120-day total.

7. Promotion, reassignment, demotion, transfer, reinstatement, or detail to a position having no greater promotion potential than that of a position the employee currently holds (or previously held) on a permanent basis in the competitive service from which the employee was separated or demoted for reasons other than performance or conduct reasons.

8. Promotion or placement of an employee entitled to non-competitive priority consideration as a corrective action for failure to be given proper consideration in a competitive promotion action under the requirements of this merit promotion plan.

9. Promotion resulting from the successful completion of a training program for which the employee was competitively selected.

10. Temporary promotion of an employee for more than 120 days to a grade level previously held on a permanent basis, except when the employee was demoted for cause.

11. Permanent promotion to a position held under time-limited (temporary) promotion or detail when originally made under competitive procedures and the possibility for permanent action was identified in the vacancy announcement.

12. Noncompetitive conversion of a severely disabled individual (as defined in 5 CFR §213.3102) and promotion after conversion provided the position occupied has an established full performance level.

13. Noncompetitive appointment of Executive Order 12721 eligibles and promotion after conversion provided the position occupied has an established full performance level.

14. Noncompetitive appointment of eligible veterans with a 30 percent or more disability who are serving on temporary appointments and promotion after conversion provided the position occupied has an established full performance level.

15. Noncompetitive conversion of students under the provisions of the Pathways Program.

16. Other types of actions not specified above and exceptions to this plan which are permitted by rule or regulation and are consistent with the spirit and intent of the merit systems principles delineated in Title 5. These actions must be approved by the Director of Human Resources.

11. MANDATORY, PRIORITY CONSIDERATION, AND REEMPLOYMENT PRIORITY LIST (RPL)

Mandatory Placement:

In order to be mandatory placed in a position, the individual must meet basic qualification requirements. Before filling positions through the procedures of this Merit Promotion Plan, the following categories of individuals will be given mandatory placement entitlements:

- Persons with statutory, regulatory, or administrative reemployment or restoration rights, such as employees returning from military service.

- Placement actions required under reduction-in-force (RIF) procedures for eligible candidates under provisions of the Career Transition Assistance Program (CTAP) and Interagency Career Transition Assistance Program (ICTAP) must be found to be well-qualified and within the local commuting area.

- Placement, reassignment, or promotion that is directed by OPM, the Merit Systems Protection Board (MSPB), or other authority that is required in order to effect a corrective action resulting from an appeal, grievance, or EEO complaint decision, or to correct a violation of law or regulations.

- The Reemployment Priority List (RPL) is a list of employees within a local commuting area who have been separated from the Agency due to RIF or work-related injury. If an employee on the RPL is well-qualified for a vacancy that exists within his or her local commuting area, the employee must (with few exceptions) be selected before hiring anyone from outside the agency. This also includes placement of qualified disability annuitants and former employees receiving Workers Compensation.

Priority Consideration:

1. Before making selections under competitive promotion procedures, priority consideration will be provided to current employees who are receiving grade or pay retention because they were involuntarily placed in lower grade positions for reasons such as reduction-in-force, correction of a classification error, or declination of a functional transfer. Employees entitled to priority consideration will be referred to the hiring manager before a promotion certificate or other referral list is issued; however, the hiring manager is not required to interview or select employees referred under these provisions.

2. If these employees are qualified, interested, and within the area of consideration, priority consideration must be extended for positions at or below the grade from which demoted and in the pay group which covered the employee prior to placement in the lower grade position.

3. Priority consideration will not extend to positions which offer known promotion potential to a grade higher than that from which demoted. Priority consideration ends when the employee is no longer entitled to grade or pay retention.

4. Declination of an offer at an intervening grade will terminate the employee's entitlement to re-promotion at the grade level, but the employee will continue to receive priority consideration for higher grades up to and including that from which downgraded unless further declinations occur.

5. Employees awarded priority consideration as part of the disposition of an EEO complaint and employees denied proper promotion consideration because of an error or promotion program violation are also entitled to priority consideration. Unless otherwise dictated by settlement agreement, declination of a valid job offer within the commuting area by these employees will result in termination of entitlement to priority consideration.

12. RESPONSIBILITIES

Division of Administration is responsible for general oversight of this Plan.

Office of Human Resources is responsible for:

A. Assessing the effectiveness and efficiency of the Agency's Merit Promotion Program and its overall compliance with legal and regulatory requirements;

B. Establishes, administers, and when necessary, overseas revision of the NLRB merit promotion plan;

C. Overseas evaluation of the administration of the merit promotion program;

D. Ensures compliance with the Merit Systems Principles (5 USC § 2301) and the prevention of Prohibited Personnel Practices (5 USC § 2302), see Appendices A and B;

E. Ensure that the Merit Promotion Plan is applied fairly and equitably, and operates the plan for employees and positions under his/her appointing authority. In addition, the Associate Director (Employee Solutions);

F. Oversee technical assistance and guidance provided by HR Specialists on all promotion matters to managers, supervisors, and employees;

G. Ensures that those who are assigned merit promotion administration responsibilities are properly trained to assume such responsibilities;

H. Ensures that public notice requirements are met in accordance with 5 CFR 330.103;

I. Determines whether selective placement factors are appropriate and consistently applied; and

J. Ensures that merit principles and requirements have been applied before effecting actions to fill a position and takes corrective action where appropriate when violations of these principles occur.

Human Resource Specialists:

In accordance with delegation of authority, the Human Resource providers are responsible for:

K. Adhering to the merit promotion and placement program requirements to ensure that the provisions of this program and 5 CFR 335 are met;

L. Advising managers, subject matter experts and selecting officials about the provisions of the program;

M. Avoiding violations of merit systems principles, prohibited personnel practices and ensuring compliance with applicable laws, rules and regulations and other applicable internal policies and procedures;

N. Evaluating candidates to determine eligibility;

O. Collaborating with subject matter experts (SME) and/or selecting official to develop applicant assessment procedures that are in compliance with 5 CFR 300(a);

P. Collaborating with subject matter experts (SME) and/or selecting official in the development of valid and reliable assessment tools that are consistent with the technical standards in the Uniformed Guidelines on Employee Selection Procedures (UGESP), 29 CFR 1607;

Q. Partnering with the subject matter expert (SME) and/or selecting official to identify the qualification requirements for the position to be filled and provide guidance and assistance with the selection and weighting of the self-assessment occupational questions;

R. Evaluating applicants based on the U.S. Office of Personnel Management General Schedule (GS) Qualification Standards or Federal Wage (WG) System Qualifications and conducting a thorough analysis of the applicant's application and responses to the applicant's self-assessment (i.e., occupational questionnaire, crediting plan);

S. Notifying all applicants of the status of their application at key stages of the application process in accordance with Section 23.R of this Merit Promotion Plan;

T. Validating selections in accordance with all applicable laws, rules and regulations; and

U. Will remove or recuse himself/herself from any case that involves a relative or household member, including positions for which the HR Specialist is personally interested in being considered.

Subject Matter Experts (SMEs):

The Subject Matter Expert (SME) is responsible for:

1. Collaborating with the servicing HR Specialist to conduct the job analysis, developing valid and reliable applicant assessment tools (i.e., self-assessment occupational questionnaires, crediting plan), and providing input on the qualification requirements for the position to be filled;

2. Assisting with the selection and weighting of the self-assessment occupational questionnaire and recommending any necessary selective placement factors to be considered prior to recruitment for a position;

3. Serving on the interview panel as a recommending official, as needed; and

4. Maintaining confidentiality of the assessment tool(s) and applicant's information during and following the recruitment and hiring process.

Management/Selecting Officials:

Managers and Selecting Officials are responsible for:

1. Complying with the principles and requirements of this Plan when filling a position, including the principles of equal employment opportunity, merit systems principles and prohibited personnel practices. In addition, managers and selecting officials are responsible for taking appropriate corrective action when violations of these principles and requirements occur;

2. Anticipating staffing needs and consulting with the Office of Human Resources to ensure timely submission of documents necessary to begin recruitment and hiring processes;

3. Engaging in identifying the qualifications for the position to be filled and documenting the justification for use of and importance of any selective placement factor(s) used during the evaluation process;

4. Collaborating with the Office of Human Resources (or to provide a designee to fulfill this responsibility) in order to assist with the development of the job analysis. The designee, if any, must be a SME at the same grade level or above the position being advertised;

5. Participating in the selection and weighting of occupational questions;

6. Complying with and understanding the provisions of this Merit Promotion Plan;

7. Ensuring subordinates receive appropriate consideration for advancement opportunities arising during their temporary absences for leave, travel, detail, training, military service or serving in public international organizations or on Intergovernmental Personnel Act assignments when such assistance is properly requested in writing by the subordinate for known, and

8. Notifying subordinates by email or telephone of career advancement opportunities which occur during an unexpected absence, such as incapacitation, care of or death of a family member, etc.

Applicants

Employees/Applicants are responsible for:

1. Becoming familiar with and complying with the provisions of this Merit Promotion Plan;

2. Providing complete and accurate information regarding their qualifications for the vacancy announcement to which they are applying;

3. Following the application procedures outlined in the vacancy announcement and submitting all of the required application materials by the closing date of the vacancy announcement;

4. Advising their supervisor, in writing, by hard copy or by email, if they (or a relative or household member) want to be considered for opportunities within the office that may occur during a period of their temporary absence for scheduled leave, travel, detail or training. In such instances, employees will ensure that they have taken the necessary steps to be able to apply for any such job opportunities. This includes ensuring that they have a current saved resume and any necessary supporting documents (SF-50s, performance appraisals, transcripts, etc.) uploaded and saved in their USAJOBS account. In addition, employees may establish a USAJOBS Search Agent to receive vacancy announcement email notifications; and

5. A Human Resources employee who interesting in being considered for a job opportunity must advise their supervisor, in writing, by hard copy or by email they intend to apply for the job opportunity to ensure they recuse themselves from involvement in ay phase of the recruitment process. Likewise, the Human Resources employee must make the same notification to their supervisor if they are aware that a relative or household member wants to be considered for a job opportunity within NLRB to recuse themselves from any involvement in the recruitment process.

13. EFFECTIVE DATE

1. Promotions, reassignments, and transfer actions are made effective the Sunday of the beginning of the pay period;

2. Change to lower grade actions are processed the Saturday at the ending of the pay period; and

3. The HR Specialist establishes the effective date in consultation with the selecting official.

14. DEFINITIONS

A. Accretion of Duties: Non-competitive advancement to the next higher grade level due to reclassification of the additional duties and responsibilities in a position currently held.

B. Approving Official: The Manager or supervisor who has final approval over selections.

C. Area of Consideration: See "Who May Apply".

D. Best Qualified (BQ) Candidates: Those candidates evaluated against the KSAOs for the position identified as most capable of performing the duties of the position when compared with other qualified and eligible candidates for the position. These candidates are referred to the selecting official on a merit promotion certificate.

E. Career Ladder Position: The grade progression from entry level to full performance level is identified and documented in position descriptions and vacancy announcements.

F. Category Rating: A ranking and selection procedure used to assess applicants for positions filled through the competitive examining process. Under category rating, applicants are evaluated based on job-related criteria and placed into predefined quality categories with individuals who possess similar levels of job related competencies (KSAs). Category rating is synonymous with alternative rating as described in 5 USC § 3319. The procedures for the category rating process in NLRB are defined in PER-28.

G. Certificate of Eligibles: A list of qualified/best qualified candidates who are eligible for selection.

H. Competitive Candidates: A certificate of qualified candidates, listed alphabetically, issued to a selecting official with each candidate's application package. Refer to applicable negotiated agreements for the order of referral of bargaining unit employees.

I. Crediting Plan: The criteria or standards against which eligible candidates are compared and ranked for determining those highly (HQ) and/or best qualified (BQ).

J. Detail: The temporary assignment of an employee to a different position or an unclassified set of duties, with no change in pay or grade, for a specified period of time, with the employee returning to the former position at the end of the assignment.

K. Effective Date: The date established after the selecting official signs and approves an action.

L. Eligible Candidates: Those applicants who meet the minimum qualification standards for the position and other regulatory requirements such as time in grade (TIG), as well as applicable selective placement factors, by the closing date of the announcement or by a date specified on the announcement.

M. Evaluation Criteria: Standards of job-related knowledge, skills, abilities and other personal characteristics (e.g., behavioral indicators, etc.), and/or competencies which are indicative of successful performance in the position to be filled. Criteria are used as standards against which the eligible candidates are compared and ranked for determining the highly and/or best qualified (BQ).

N. Evaluation Methods: The means of measuring a candidate against the evaluation criteria. Mandatory methods, which must be considered for all candidates, are performance appraisals and relevant incentive awards. Optional methods include tests, interviews and relevant training.

O. Excepted Service: Unclassified service, unclassified Civil Service or positions outside the competitive service and the senior executive service. Excepted service positions have been excepted from the requirements of the competitive service by law, Executive order, or OPM regulation. (5 USC. 2103 and 5 CFR Part 213).

P. Exceptions: Promotions that do not require competitive procedures and are therefore excepted from competitive procedures of this Plan.

Q. Gender Identity: Means one's inner sense of one's own gender, which may or may not match the sex assigned at birth. Different people choose to express their gender identity differently. For some, gender may be expressed through, for example, dress, grooming, mannerisms, speech patterns, and social interactions. Gender expression usually ranges between masculine and feminine, and some transgender people express their gender consistent with how they identify internally, rather than in accordance with the sex they were assigned at birth.

R. Highly Qualified (HQ) Candidates: Eligible candidates who have been determined to possess the knowledge, skills, abilities and other personal characteristics described by the evaluation criteria as necessary to perform the position in a highly successful manner.

S. Job Analysis: The process of identifying the knowledge, skills and abilities (competencies) essential to a position in order to develop a job-related basis for evaluation and selection of candidates.

T. Knowledge, Skills and Abilities: A list of special qualifications and personal attributes that are needed for a particular job and which the Agency wants to find in the person selected to fill a particular job. The primary purpose of KSAs is to measure those qualities that will set one candidate apart from the others.

U. Merit Promotion: The system under which an Agency considers an employee for vacant positions on the basis of personal merit. Vacant positions are usually filled through competition with applicants (current competitive service employees) being evaluated and ranked for the position on the basis of their experience, education, competencies and performance.

V. Occupational Questionnaire: A product of the job analysis that provides a method of assessing a candidate's background in relation to the job being filled.

W. Performance Appraisal: Evaluation of an employee's work performance.

X. Priority Placement Consideration: If a procedural error or violation results in applicants failing to receive proper consideration in a competitive action, they are entitled to be referred to the next vacancy for which they qualify, in any geographic area that the individual deems acceptable, before other candidates are sought. However, the vacancy must be for the same grade and under the same promotion plan as the position for which they were not properly considered.

Y. Promotion: The change of an employee to a position at a higher grade level within the same classification system and pay schedule or to a position with a higher rate of basic pay in a different job classification system and pay schedule.

Z. Qualified Candidates: Candidates who meet the minimum qualification and eligibility standards, time-in-grade and time after competitive appointment requirements, and possess all appropriate selective placement factors, if applicable, for a particular position by the closing date of the vacancy announcement.

AA. CTAP/ICTAP: (Career Transition Plan/Interagency Career-Transition Assistance Plan) a Federal placement program that provides priority consideration for job opportunities to certain individuals who have been or who are being adversely impacted by Federal downsizing activities.

BB. Rating: Reviewing the backgrounds of candidates to determine if they meet the minimum qualifications for the position.

CC. Reappointment Priority List (RPL): A list of employees within the local commuting area who have been separated from an agency due to reduction in force (RIF) or work-related injury. If an employee on the RPL is well-qualified for a vacancy that exists within his or her local commuting area, the employee must (with few exceptions) be selected before hiring anyone from outside the agency.

DD. Reassignment: The change of an employee from one position to another without a promotion or demotion.

EE. Reinstatement: The non-competitive career or career-conditional re-employment of an individual formerly employed in the competitive service who had earned competitive status.

FF. Selecting Official: The individual in the organization who is authorized to make a selection for the position this is to be filled.

GG. Selective Placement Factor: KSAs in addition to the basic qualification standards essential for satisfactory performance on the job, and which cannot be learned within a reasonable time on the job. The following are examples of appropriate selective placement factors for determining eligibility when these factors are essential for successful job performance:

a. Ability to speak, read, or write a language other than English.
b. Knowledge and abilities related to a certain program or mission when these cannot readily be acquired after selection for a position.
c. Ability in a functional area (such as, the ability to evaluate different data processing systems).

HH. Sexual Orientation: Means one's emotional or physical attraction to the same and/or opposite sex.

II. Subject Matter Expert: An individual who exhibits a high level of expertise in performing a specialized job, task, or skill within the organization and/or who possesses an in-depth knowledge of a particular subject area.

JJ. Temporary Appointment: An appointment made for a limited period of time and with a specific not-to-exceed (NTE) date.

KK. Time-In-Grade Restrictions: The minimum period of time specified in Title 5 CFR 300, Subpart F, that an individual must serve after his or her last permanent appointment before he or she can be: promoted, reassigned to a different line of work, or relocated to a different geographical area.

LL. Time-Limited: Promotion (Temporary Promotion): The temporary assignment of an employee to a higher graded position for a specified period of time, with the employee returning to his/her permanent position upon the expiration of the temporary action. In order for an employee to be temporarily promoted, he/she must meet the same qualification requirements that are necessary for a permanent promotion. The temporarily promoted employee receives the higher graded salary for the period assigned and gains quality experience and time-in-grade at the higher grade level.

MM. Transfer: The movement of a career or career-conditional employee from one Federal agency to a position in another agency without a break in service.

NN. Well Qualified Candidate: A candidate who, under Category Rating Procedures, is determined to meet the minimum qualification required for a position (e.g., education, selective placement factors, etc.). The candidate is determined to be proficient in some, but not all, of the requirements for the position and received a rating of at least 85.0 are considered to be well qualified for CTAP purposes only.

OO. Who May Apply: The Area of Consideration is known as "Who May Apply" within NLRB vacancy announcements. It describes the individuals from whom NLRB will accept applications. It may be restricted to a limited group of individuals (e.g., all NLRB permanent civilian employees), or be governed by Agency's CBAs, it may be broad to accept individuals with appointment eligibilities. It may also be open to Veterans Employment Opportunities Act (VEOA) of 1988 Eligibles and candidates with Federal status.

PP. Vacancy: A vacancy is an unencumbered position which management plans to fill.

15. PROMOTION ACTIONS

Career Ladder Promotions:

- A career promotion is the promotion of an employee without competition when competition was held at an earlier stage. For example, when an employee was selected for a position under competitive promotion procedures and the fact that the initial selection could lead to promotion was made known to all potential candidates.

- Career Ladder Promotions are established based upon an assessment of work to be performed by individuals in each occupational series throughout the Agency. Career ladders are usually the same for positions within an occupational series, but differences can occur. Differences may be based on a variety of situations that result in position or organizational differences that impact the position or the availability of higher level work. If a career ladder is established that is different from the normal career ladder for a particular position, documentation that supports the determination must be maintained by the HRO.

- Typically, an employee must compete for a position with a higher career ladder than his/her current position. Specific exceptions to the requirement for competition are found at 5 CFR § 335.103(c)(3)(i) through (vii).

- An employee is not guaranteed promotion to all higher grades in a career ladder. Changes to the work requirements of the position or the organization to which the position is assigned might affect the opportunity for promotion to a higher grade.

- Noncompetitive promotions within a career ladder are not an automatic entitlement and every employee will not necessarily be promoted to the next higher grade level in a career ladder.

- Employees may be promoted, without competition, when work is available, assigned on a regular and recurring basis, satisfactorily performed at the next higher grade level, and all other regulatory requirement are met.

- In order to be eligible for a career ladder promotion, an employee must be performing at a level of "satisfactory" or higher at the next lower grade level in the career ladder.

Accretion of Duties Promotion Actions:

1. Accretion of duties is the upgrading of an employee's position (with no higher promotion potential) because of additional duties and responsibilities. For all cases involving an accretion of duties, the reclassification of the position must identify the specific changes in the duties and responsibilities between the old and the new positions and the cause of the changes.

2. All of the following factors must exist to support an accretion of duties promotion:
    a. there is demonstrated evidence of higher-level work;
    b. the employee's current position is absorbed into the new position and is a natural successor to the current position;
    c. the action will not result in a residual vacancy that will need to be filled;
    d. the position is determined to have no further promotion potential beyond the grade level to which the employee is accreted; and
    e. the promotion does not directly affect other employees in the organization who report to the same immediate supervisor.

3. Supervisors who anticipate that they might initiate an accretion of duties promotion for an employee should seek the advice and assistance of an HR Specialist before initiating the action.

4. A noncompetitive promotion is not permitted when supervisory duties are added to a nonsupervisory position causing it to be classified to a higher grade.

    Documentation of accretion of duty promotions must provide evidence showing that factors 1 through 4 above, apply.

Time-Limited Promotions:

1. Time-limited promotions are intended for meeting temporary needs of the Agency's work program when necessary services cannot be provided by other means. Temporary promotions can be used to:
    A. Fill temporary positions;
    B. Accomplish project work;
    C. Fill positions temporarily pending reorganization or downsizing; or
    D. Meet other temporary needs.

2. The initial 120 days of a time-limited promotion may be made noncompetitively, which means the selected employee does not have to compete with other employees for the time-limited assignment. All time spent on noncompetitive time-limited promotions and details to higher graded positions during the preceding 12 months counts toward the 120-day total. If the time-limited promotion is extended beyond 120 days, competition is required.

3. The maximum time period for a time-limited promotion is 5 years, unless the Office of Personnel Management (OPM) authorizes the agency to make and/or extend it for a longer period. A temporary promotion that was originally made under competitive procedures can be extended up to 5 years without further competition.

4. A time-limited promotion may be made permanent without further competition provided the time-limited promotion was originally made under competitive procedures and the fact that it might lead to a permanent promotion was made known to all potential candidates.

5. Employee Acknowledgment of Conditions: Prior to the effective date of the time-limited assignment, the employee must sign and date a statement that he/she has received a written notice of the conditions of assignment listed above.

6. Negotiated union contracts should be reviewed prior to effecting time-limited promotion actions of employees covered by a bargaining unit.

16. REASSIGNMENT/CHANGE TO LOWER GRADE ACTIONS

a. An employee may seek a reassignment or change to a lower grade outside of an announced vacancy process, or a manager may seek to noncompetitively reassign an employee. The employee must be eligible for noncompetitive consideration to a permanent internal assignment and must submit a request for the noncompetitive reassignment.

i. Employee requests for noncompetitive reassignment may be for positions within or outside of the current Agency organizational level and may involve a move from one geographic location to another.
ii. Such requests will be considered based on NLRB needs.

b. Priority placement program requirements must be satisfied before an employee may be noncompetitively reassigned/changed to a lower grade.

17. DETAIL ACTIONS

A. A detail is a temporary assignment to a different position for a specified period when the employee is expected to return to his or her regular duties at the end of the assignment.

B. An employee who is on detail is considered for pay and strength count purposes to be permanently occupying his or her regular position.

C. A detail action may be documented by Standard Form 52, Request for Personnel Action.

D. Competitive procedures must be used on detail actions as follows:

ACTION	DETAIL ACTION	LENGTH OF DETAIL	USE OF COMPETITIVE PROCEDURES
Detail	Same grade and no known promotion potential.	Detail is for any length	No
	Potential higher grade or to a position of the same grade with known promotion potential	Detail is for 120 days or less	No
		Detail is for more than 120 days	Yes

18. APPLICATION OF VETERANS PREFERENCE TO POSITIONS EXEMPT FROM APPOINTMENT PROCEDURES

In view of the circumstances and conditions surrounding employment in the following classes of positions each agency is required to follow the principle of veteran preference as far as administratively feasible and, on the request of a qualified and available preference eligible, to furnish him/her with the reasons for his/her non-selection.

A. Positions filled by persons appointed without pay or at pay of $1 a year;

B. Positions outside the continental United States and outside the State of Hawaii and the Commonwealth of Puerto Rico when filled by persons resident in the locality, and positions in the State of Hawaii and the Commonwealth of Puerto Rico when paid in accordance with prevailing wage rates;

C. Positions which the exigencies of the national defense program demand be filled immediately before lists of qualified applicants can be established or used, but appointments to these positions shall be temporary appointments not to exceed 1 year which may be renewed for 1 additional year at the discretion of the agency;

D. Positions filled by appointees serving on an irregular or occasional basis whose hours or days of work are not based on a prearranged schedule and who are paid only for the time when actually employed or for services actually performed;

E. Positions paid on a fee basis;

F. Positions included in Schedule A (see 5 CFR Part 213 - Subpart C) and similar types of positions when OPM agrees with the agency that the positions should be included hereunder;

G. Positions included in Schedule C (see 5 CFR Part 213 – Subpart C) and positions excepted by statute which are of a confidential, policy-making, or policy-advocating nature;

H. Attorney positions;

I. Positions filled by reemployment of an individual in the same agency and commuting area, at the same or lower grade, and under the same appointing authority as the position last held; provided that, there are no candidates eligible for the position on the agency's priority reemployment list established in accordance with 5 CFR § 302.303; and

J. Positions for which a critical hiring need exists when filled under 5 CFR § 213.3102(i)(2) of this chapter.

19. AGENCY REVIEW

a. Periodically, the NLRB Human Resources Office Compliance Unit will review the Merit Promotion and Placement Program to ensure that changes in law or regulation are incorporated and issue a notice to employees outlining the key provisions, changes, and amendments of the program.

b. The views of managers, supervisors, and representatives of labor organizations will be obtained when significant changes are made in the program.

20. MAINTENANCE AND RETENTION OF RECORDS

General: The HR service provider or the automated recruitment system database will maintain all records associated with the recruitment and filling of the position. Selecting officials will maintain all records associated with the interview process, if conducted.

Merit Promotion File. At a minimum, the following information must be retained in USA Staffing:

a. Vacancy announcement;
b. Official position description;
c. Names of all candidates and eligibility/ineligibility results;
d. Documentation of job analysis used to identify selective and quality ranking factors;
e. Crediting plan or assessment questionnaire;
f. Documentation for adjusting applicant answers when using an automated qualification, rating, and ranking system, if applicable;
g. Any written guidance and instructions issued to the promotion panel, if applicable;
h. Record of HR specialist, SME, or promotion panel ratings, both individual ratings and collective determination of best qualified, if applicable;
i. Record of automated system ratings, rankings, and identification of best qualified, if applicable;

i. Names of any candidates who received special consideration and the reason(s), if applicable;

j. Application packages timely received from each applicant;

k. Merit promotion certificate;

l. Names of promotion panel members and panel chairperson, if applicable; and

m. Copy of notifications to applicants indicating their consideration and qualification finding for the position or their non-consideration for the position, if applicable.

Retention of Files:

1. Merit promotion files will be retained in the HR and/or in the automated recruitment system database for a period of 2 years from the effective date of the personnel action that resulted from a selection made from the merit promotion/referral certificate. If no selection is made from the certificate, the merit promotion file will be retained for a period of 2 years from the date the selecting official certified that there was no selection.

2. In instances where some form of complaint has been filed concerning an action, the merit promotion file must be retained for a minimum of 2 years following resolution of the case.

3. Merit promotion files not required to be maintained for more than 2 years may be retained for periods of more than 2 years, at the discretion of the servicing HRO, when individual situations so warrant.

21. ACCESS TO INFORMATION

a. Employees and Labor Organizations:

i. The OHR Office will inform employees and concerned or appropriate labor organizations of the merit promotion policies, changes, evaluation techniques and ranking methods, and career and promotion opportunities. Employees will be notified in writing of the merit promotion program provisions and informed where copies of the MPP are available.

b. Employees/Applicants:

i. All employees and other applicants who apply for specific vacancies will receive notification at key stages of the application process and as specifically addressed in Section 23.T of this MPP.

ii. An applicant is entitled to see, upon written Freedom of Information Act (FOIA) request, only those documents used in considering him/her for a particular vacancy.

iii. Employees/applicants may review appropriate regulations, policies, and qualification standards in the OHR or on OPM's website.

22. REQUESTS FOR RECONSIDERATION OF RATINGS AND GRIEVANCES

A. Requests for Reconsideration of Rating Decisions:

Applicants may make initial inquiries about their qualification determinations and/or request a reconsideration of a rating decision by contacting the servicing HR Specialist assigned to recruit for the position. The request for reconsideration of rating will be conducted in accordance with the provisions specified in Section 23.L of this Plan.

B. Grievances:

Employees have the right to file a grievance on the application of the provisions of this Merit Promotion Plan. However, non-selection from among a group of properly rated and certified applicants is not an appropriate basis for the filing of a formal grievance. Any corrective action will be taken in accordance with the provisions of 5 CFR 335 to rectify a violation of law, OPM regulations and procedures, and/or NLRB policies and procedures.

23. PROCEDURES

A. Validate the Need to Fill the Position: Management must validate the need to fill the position against NLRB Workforce, Staffing and Recruiting Plans:

1. Management reviews NLRB workforce, succession and staff acquisition plans; and
2. Management reviews the NLRB recruitment plan to identify the resources and sources for recruitment.

B. Initiation of Request for Personnel Action: Management creates a Request for Personnel Action SF-52 to fill the position.

C. Approval of SF-52: Upon approval of the SF-52, the Request for Personnel Action is forwarded to OHR.

D. Review of Position Description: A review of the position description is conducted to determine the currency and accuracy of the duties and occupation.

1. identify changes, if any, to the position;
2. verify the risk level designation; and
3. verify the sensitivity level/clearance eligibility of the position.

E. Conduct a Job Analysis and Recruitment Strategy:

Conducting a Job Analysis:

1. General: A job analysis sets the foundation for outreach, recruitment, and selection actions and should be the first step in the recruitment process. It is a systematic procedure for

gathering, documenting, and analyzing information about the content, context, and requirements of the job to identify the essential functions of the position and the necessary competencies, knowledge, skills, and abilities (KSAs) required.

2. The job analysis must identify objective, assessable knowledge, skills and abilities (KSA)/competencies related to important job duties, work outcomes, or work behavior necessary for successful performance in the job being filled. It is used to document the relationship between the duties and responsibilities and the knowledge, skills, abilities, and other characteristics (KSAOCs) or competencies required to perform the duties and responsibilities. It is also used to document the associated KSAOC/competencies-based application questions for use in an automated rating and ranking system. The validity and propriety of selective and/or ranking factors must be clearly reflected and supported by a current position description of the job for which they are used.

3. A Subject Matter Expert (SME) or the selecting official in conjunction with a HR Specialist must conduct a job analysis when filling a position.

4. At a minimum, the Job Analysis must include:

    a. Identification of the grade level of the position;
    b. Validity of the assessment;
    c. Identification of the expected number of applicants;
    d. Identification of the critical duties and responsibilities of the job;
    e. Identification of the knowledge, skills and abilities (KSA) or competencies required to perform the duties and responsibilities of the job;
    f. Identification of the KSAs/competencies to be included in the assessment strategy;
    g. Identification of the factors that are important in evaluating eligibles; and
    h. Documentation of the job analysis process for future use.

Conducting a Recruitment Strategy:

1. General: The recruitment strategy is used to prompt discussion between the hiring manager and OHR regarding a current or foreseen hiring need. The outcome of the recruitment strategy meeting is the alignment of human resources and the hiring manager in a strategic partnership. The partnership is desired so that the hiring need is well defined from the outset in common terms and a straightforward manner.

2. Conduct a Recruitment Strategy Meeting: The outcome of the recruitment strategy meeting is an alignment of human resources and the hiring manager in a strategic partnership so that the hiring need is well defined from the outset in common terms and a straightforward manner. Completion of an identified recruitment strategy form is required to:

    a. Identify the challenges involved in attracting a high-quality workforce that closes skill gaps in mission-critical occupations;

b. Maintain mission-critical competencies at the desired level using business forecasting and workforce analysis results;
c. Utilizes analysis of statistical data relative to the success of various types of appointment and recruitment flexibilities;
d. Utilizes aggressive and multi-faceted strategies when competing for desired talent;
e. Utilizes recruitment flexibilities and appointing authorities authorized by OPM (e.g., direct hire, category rating, etc.) to enhance recruitment scope and timeliness;
f. Involves senior leaders and managers assisting human resources (HR) staff in implementing strategic recruitment initiatives, including participation in such as activities as recruitment fairs and outreach programs;
g. Choose a ranking method that will be used to fill the position, such as: category ranking or traditional ranking procedures; and
h. Identify career patterns for applicants based on workforce and recruitment planning.

3. Documentation of Recruitment Strategy Meeting: A Recruitment Strategy Meeting Guide will be completed to document the completion of a recruitment strategy meeting (See Appendix C).

F. Create and Post a Vacancy Announcement:

1. Determining the "Who May Apply" Area of Consideration: The "Who May Apply" area of consideration must be sufficiently broad to ensure the availability of a reasonable number of highly qualified applicants, taking into account the nature and level of the position to be filled, merit principles, Equal Employment Opportunity (EEO) principles, and applicable regulations and requirement of applicable negotiated union agreements. The areas of consideration must be identified in the vacancy announcement and may not be changed once the announcement is open.

A. The scope of competition for each vacancy will be individually determined by consultation between the HR Specialist and the respective supervisor/manager.

B. Each vacancy will be advertised in a geographic/organizational area large enough that a reasonable number of well-qualified candidates may be anticipated.

C. At a minimum, the "Who May Apply" area of consideration should be at least Office-wide, unless applicable collective bargaining unit agreements (CBAs) define a smaller area of consideration.

D. The area of consideration may be expanded when the selecting official and the Human Resources Office (HRO) agree that a broader area of consideration is desirable to seek candidates. For example, the minimum area could be extended to include Division-wide, Region-wide, NLRB-wide, Federal employees, eligible reinstatement candidates, and other candidates with competitive status or those with OPM approved interchange agreements.

E. Other factors affecting the "Who May Apply" area of consideration include:

1. Budget or staffing allocations will not allow the valid consideration of applicants from other sources; and

- Circumstances resulting from reorganization or from other factors, such as ceiling controls or hiring freezes that prevent the employing office from adding to the staff. When these conditions exist, the selecting official and the HR Specialist must certify that the position needs to be filled and that current or anticipated resources preclude filling positions from outside NLRB.

F. The basis for any decision to restrict the area of consideration to NLRB-wide must be documented and approved by the direct supervisor and maintained in the vacancy case file (see Records Retention and Disposal Section).

2. Determine Relocation Expenses: The decision to pay or not pay relocation expenses must be made prior to posting the vacancy announcement on USAJOBS.

3. Posting the Vacancy Announcement:

A. Must be posted to the USAJOBS website when filling vacancies through the competitive procedures described in this Merit Promotion Plan.

B. May also be posted on outside websites, such as *vetsforhire.com,* to increase recruitment efforts in special employment areas, such as individuals who qualify for hire under Veteran's authorities.

C. Vacancy announcement templates will be developed in the automated system to ensure that vacancy announcements include all required information and present it in a clear, consistent and standard format;

D. Must be open for a minimum of five (5) business days, not including weekends and Federal holidays. Additionally, vacancy announcements are not to open or close on a weekend or Federal holiday; and (Excepted Service Policy includes 5 days).

4. Information that **must** be included on Vacancy Announcements
   A. Agency name;
   B. Announcement number
   C. Title of the position
   D. Series;
   E. Grade(s) or equivalent and entrance pay;

F. Open and closing dates, including cut-off dates, if any;
G. Duty location;
H. Number of vacancies;
I. Description of duties;
J. Qualification requirements, including KSAs/competencies;
K. Basis for rating;
L. How to apply;
M. What documents to file;
N. Agency's definition of "well qualified" (Career Transition Assistance Program (CTAP), Interagency Career Transition Assistance Program (ICTAP) and Reemployment Priority List (RPL);
O. Information on how to claim Veterans' Preference;
P. EEO Statement;
Q. Reasonable Accommodation Statement;
R. Replacement Policy
S. Verification of Citizenship is required;
T. Recruitment/Relocation incentive opportunities;
U. Alternative work schedules;
V. Telework options;
W. Employee benefits;
X. Work/Life programs;
Y. Transit subsidies;
Z. Employee assistance programs;
AA. Incentive award opportunities; and
BB. Development and training opportunities.

A. Accepting Applications**:**

1. Acceptance of Applications Using An Automated Qualification, Rating and Ranking System:

A. Candidates must submit applications (resume and answers to application questions) online by the closing date and time specified in the vacancy announcement.

B. Hardship Criteria:
1. If applying online poses a hardship, applicants must speak to the Human Resources representative listed on the vacancy announcement prior to the closing date of the announcement to request assistance.
2. In addition, applicants who meet hardship criteria must respond to the same questions as applicants applying online and must submit a copy of their responses to questions, a copy of their resume, and all required supporting documentation, as specified in the vacancy announcement to the servicing HRO by the closing date and time specified in the vacancy announcement. An exception to the time requirement may be made in cases where there is verification of the applicant's attempt to upload a document into the automated system by online "footprint".

2. Determining Incomplete Applications:

   A. An application is considered incomplete if an applicant:

      1. Does not submit a required form or other material, as specified in the vacancy announcement;
      2. Fails to respond to questions that he or she must answer before any action can be taken; or
      3. Submits insufficient information concerning education or experience.

B. Receipt of Current Performance Appraisals:

Applicants with current Federal status are required to submit their most recently completed annual performance appraisal (dated within 18 months) which identifies the employee's official rating of record or a statement advising why the performance appraisal is not available. A performance plan is not an acceptable substitute. If the applicant fails to provide a copy of the performance appraisal, or a statement advising why it is unavailable, the applicant will be removed from consideration.

C. Receipt of Current SF-50:

Applicants with current Federal status are required to submit their most recently SF-50 If the applicant fails to provide a copy of their SF-50, the applicant will be removed from consideration.

D. Receipt of Transcripts/Educational Records:

Whenever there is a minimum education requirement or an applicant is using a combination of education and experience in order to be determined as basically qualified, the applicant must submit a copy of their transcripts. This also applies to status applicants who are applying to a position in the same occupational series than that in which they current serve (or to which they were previously appointed (prior SF-50 is not an alternative form of documentation to the transcripts). If there is a minimum education requirement and the applicant fails to provide a copy of their transcript, the applicant will be removed from further consideration. If the applicant is using a combination of education and experience to qualify and the applicant fails to provide a copy of their transcripts, the applicant will be evaluated based solely on experience.

1. The applicant's official transcripts must be received prior to extension of any job offer.

2. If the applicant fails to provide a copy of their transcripts within the specified time period, a final job offer will not be made, and the applicant will be removed from further consideration for the position.

3. A NLRB official must verify that listed school(s) are accredited prior to making a job offer(s) when using education to qualify an applicant.

4. Education completed in a foreign institution/university must be evaluated by an accredited organization to ensure that the foreign education is comparable to education received in accredited institutions in the United States.

5. When applicable, applicants are required to submit their foreign education equivalency at the time of application. Applicants who do not submit their equivalency at the time of application will be evaluated based on the information provided. Those deemed tentatively best qualified will be considered and referred to the selecting official.

6. A copy of the applicant's foreign education equivalency must be received prior to extending a job offer.

7. If the applicant fails to provide a copy of the equivalency within the time period specified, a final job offer will not be made and the applicant will be removed from further consideration for the position.

8. All equivalencies and related correspondence must be kept in the case file (and the eOPF, if selected).

E. Documentation of A Disability:

Applicants with disabilities claiming non-competitive eligibility under Schedule A must submit proof of their disability at the time of application. Applicants who do not provide this proof by 11:59 p.m. Eastern Time on the closing date will not be considered as Schedule A eligible and are to be considered as a typical applicant. Acceptable proof of an individual's mental disability, severe physical disability, or psychiatric disability and work readiness is appropriate documentation (e.g. a physician or other medical professional duly certified by a state, the District of Columbia, or a U.S. territory to practice medicine); a professional; or any Federal agency, state agency, agency of the District of Columbia, or a U.S. territory that issues or provides disability benefits.

F. Documentation of Veterans Applicable Appointments:

Applicants who claim eligibility for special veteran's appointment authorities, such as Veterans Employment Opportunities Act (VEOA) of 1988, must submit a copy of their Certificate of Release or Discharge from Active Duty (DD-214s) showing their type of discharge and other supportive documents (if applicable) at the time of application. Preference eligible or veterans who have been separated under honorable conditions from the armed forces after completing three (3) or more years of continuous active military service (as determined by the agency) may compete for vacancies under merit promotion when the agency accepts applications from

individuals outside its own workforce. Those veterans selected will be given career or career-conditional appointments under 5 CFR 315.611. Applicants are encouraged to identify the specific authority under which they are applying VEOA. Applicants who do not provide this proof by 11:59 p.m. Eastern Time on the closing date will not be considered as VEOA eligible and are to be considered as typical applicants with the application material(s) submitted. All DD-214s received must be kept in the case file (and eOPF, if selected).

1. For some positions there may be other mandatory application requirements, therefore, it is important that applicants pay careful attention to the "How to Apply" section of the vacancy announcement to determine all required application materials for any given announcement.

2. Unsolicited materials, such as copies of position descriptions and publications, will not be considered in the ranking process.

G. Evaluation Methodology:

Eligible applicants will be evaluated to determine the extent to which their qualifications exceed the minimum requirements for the position.

1. An automated system is used to evaluate eligibility and minimum qualifications, and rates applications according to defined criteria.

2. As part of the overall assessment of qualifications consideration will be given to current performance appraisal and appropriate awards.

3. A certificate of eligible candidates listed in alphabetical order will be prepared by the servicing HR Specialist. The populated certificate of eligibles and supporting documents will be forwarded to the selecting official. If 5 or fewer eligible applicants are identified no rating panel will be convened and all candidates will be referred to the selected official.

H. Determining Eligibility of Applicants:

Once a vacancy announcement closes, the HR Specialist/Assistant will:

1. Assess all applicants to determine if they meet the area of consideration, basic qualification requirements, any applicable selective placement factor(s), and time-in-grade restrictions (if applicable) for the position.

2. Evaluate applicants based on the method of evaluation chosen prior to announcing the position; and

3. Prepare a certificate(s) of eligible candidates listed in alphabetical order that includes only the best-qualified applicants.

A. Applicants must meet all U.S. citizenship requirements by 11:59 p.m. Eastern Time of the closing date of the vacancy announcement.

B. Applicants who are current status employees must meet time-in-grade requirements by the closing date of the vacancy announcement.

C. Male applicants born after December 31, 1959 must be registered with the Selective Service System unless they are exempt under 5 CFR 300 Subpart G, Selective Service Law.

D. Determining Minimum Qualifications: Applicants must meet the minimum qualification requirements as prescribed by the OPM Manual – Qualification Standards for General Schedule Positions. In addition, applicants must meet any positive education requirements and selective and/or other factors identified in the announcement as being essential to establish basic eligibility for consideration. Applicants will be considered basically qualified if they meet all of the requirements by the closing date of the vacancy announcement. A summary of these standards will be included in the vacancy announcement (see Section 14.B.4(iii), above.

E. Special Qualifications – Selective Placement Factors: Special qualification factors may be used when they are essential to the successful performance of the position to be filled. The HR Specialist must obtain approval for the use of selective placement factors from the Associate Director of Employment Solutions before they can be used in screening candidates or included in the vacancy announcement. Selective placement factors must not include requirements that would eliminate otherwise qualified candidates who need only a brief period (approximately 90 days) of orientation and/or training to successfully perform the duties of the position.

I. Evaluation of Applicants:

To receive consideration, applicants must meet appropriate OPM qualification standards for General Schedule positions, including selective placement factors, and time after competitive appointment requirements by the closing date of the vacancy announcement. For wage grade positions, applicants are evaluated using the (OPM) Job Qualification System for Trades and Labor Occupations and the job element examining method.

1. The method(s) used to evaluate applicants must be identified in the vacancy announcement. The evaluation process assures that the selection is made from the best qualified applicants.

2. Evaluations must be based on job-related requirements and applied fairly and consistently.

3. Evaluation methods may include the use of crediting plans or questionnaires, and/or other assessment tools, and/or paper review, such as structured interviews. In establishing evaluation methods, consideration will be given to current performance appraisal (within 18 months) and appropriate awards.

4. The evaluation process may be performed by HR Specialist (or Assistant); subject-matte experts (SMEs); and/or Evaluation Panel. Using the assessment tool designated for the vacancy, the HR Specialist or panel members review each applicant's background to assess the degree to which the applicant possesses the required KSAs of the position. In doing this, they just consider the applicant's quality and type of work experience, education and training, awards and accomplishments, performance appraisals and related outside experience. Based on this review, a point value is assigned for each evaluation criterion, and an overall rating is ultimately assigned to each applicant.

5. When there are 5 or fewer basically qualified applicants per grade level, formal rating and ranking is not required, and all qualified applicants will be referred in alphabetical order to the selecting official for equal consideration among all of those referred.

J. Category Rating Process:

1. Under 5 U.S.C. § 3319, agencies are authorized to develop Category Rating as an alternative process to assess applicants for jobs filled through competitive examining. This method may also be used to fill any competitive service position, including a position filled through a term or temporary appointment. The process is similar to the traditional rating and ranking method, but allows managers greater flexibility to hire qualified applicants based on merit, veterans' preference and staffing needs.

2. Category rating is an alternative ranking and selection procedure wherein qualified eligible candidates are evaluated using quality categories rather than by assigning individual numeric scores. Following an assessment of their skills against job-related criteria (as in the traditional method of rating and ranking applicants, candidates are then placed into two or more pre-defined categories (e.g., Good, Better, Best) based on their qualifications and veterans' preference.

3. Category Rating for the competitive service in the NLRB will be conducted in accordance with NLRB Administrative Policies and Procedures Manual (PER) 28, Category Rating Procedures.

K. Reconsideration of Qualifications or Rating:

1. When a request for reconsideration is received from an applicant, the HR Specialist will notify the Associate Director of Employment Solutions or his/her designee that a Request for Reconsideration has been received.
    A. Begin the reconsideration by completing the Section A of the Reconsideration of Rating Form.

B. Request a secondary review of the applicant's resume, occupational questionnaire, and any additional supporting documentation to determine if the applicant meets the minimum qualifications as described in the Vacancy Announcement.
    1. The secondary review will be conducted by another HR Specialist also referred to as the Secondary Reviewer.
    2. Secondary Reviewer will review the applicant's resume, occupational questionnaire, and any additional supporting documentation to determine if the applicant meets the minimum qualifications as described in the Vacancy Announcement. Notate their findings in Section B of the Reconsideration of Rating Form.
    3. If the applicant does NOT meet the minimum qualifications, The applicant's rating will remain unchanged. The Reconsideration of Rating Form will be returned to the initial HR Reviewer.
    4. If the applicant DOES meet the minimum qualifications, the Secondary Reviewer will notate their findings in Section B of the Reconsideration of Rating Form.

L. Application of CTAP/ICTAP and Veterans Preference:

CTAP/ICTAP is automatically applied prior to posting vacancy announcements advertised Merit Promotion respectively. Veterans' preference is not applicable to merit staffing.

M. Preparation of Referral Lists:

1. HR Specialist may issue a competitive and/or non-competitive certificate. Each certificate would have a maximum of ten (10) referred candidates and 5 additional candidates per additional vacancy.

2. Selecting officials should have the opportunity to make a choice from among an adequate number of candidates. Names of referred candidates will be listed in alphabetical order by last name.

3. Life of the Referral List**:** The original life of the list is 30 calendar days. An extension of up to 90 days may be granted by the HRO, at the written request of the selecting official, to accommodate unexpected delays. All extensions should be kept to the minimum period of time necessary for a selection to be made. Extensions beyond 90 days may be granted only to accommodate unusual circumstances, e.g., hiring freezes, reorganizations, budget limitations, etc. If at any point during the life of the referral list the selecting official elects to fill more vacancies than was previously advertised, the vacancy announcement must be reopened, at a minimum, to candidates eligible for CTAP/ICTAP; and it must state the revised number of vacancies to be filled. In no case will the life of the list extend beyond 120 days.

N. Selection Policy**:**

Management retains the right:

1. To fill or not to fill a specific vacancy and to determine the most appropriate method for filling that vacancy, including the use of competitive procedures pursuant to this Plan;

2. To select or not select from among a group of best-qualified candidates;

3. To select from other appropriate sources such as reemployment priority list, reinstatement, transfer, handicapped or Veterans Readjustment eligibles or those within reach on an appropriate OPM register.

4. Official Notice of Selection can only be extended by OHR.

O. Applicant Interviews:

Although it is not mandatory that all referred candidates be interviewed, the selecting official or his/her designee is strongly encouraged to conduct interviews (either in person or by telephone, or automated means) with each of the referred candidates. At a minimum, selecting officials must uniformly consider the referred candidates using job related criteria and be prepared to explain and/or document the consideration they receive, in response to inquiries.

There are times when an applicant cannot be reached over the telephone, and he/she does not respond to a telephone mail message. If this occurs, the agency official should contact the OHR as soon as possible. The management official can send written correspondence to the applicant asking that he/she contact the management official to make arrangements for an interview. The correspondence should state that if the Agency does not hear from the individual by a certain date, it will be assumed that they are no longer interested in being considered for the position. This provides written documentation of the attempt to contact the applicant.

P. Reference Checks:

Selecting officials are responsible for conducting reference checks prior to making a final selection for any position. Checking references before making a final selection can save time, money and effort, since it reduces the likelihood of making an inappropriate or unwise selection. Selecting officials document the reference check, including the date, time, individual contacted and a brief summary of the discussion.

Q. Release of Candidates:

The OHR is the only NLRB component that will make official requests for the release of employees selected for positions. NLRB employees selected are to be released from their old positions at a reasonable amount of time. Normally, this will be construed to mean two (2) pay periods from the date of selection except in cases involving undue hardship or serious disruption

of work. However, any such deviations will be kept to a minimum. In no case will an employee be denied promotion because of difficulty in locating a replacement.

R. Applicant Notification:

1. Applicants must be notified at key stages of the hiring process. Key stages are identified as follows:
   A. Application received;
   B. Qualified/not qualified;
   C. Referred/not referred; and
   D. Selected/not selected.

2. Documentation of the date(s) for each notification is automatically recorded in USA Staffing.

From: Employment Law360
To: Ring, John
Subject: Internal Workplace Harassment Claims Surge Amid #MeToo
Date: Friday, April 5, 2019 4:01:41 AM

EMPLOYMENT

Friday, April 5, 2019

TOP NEWS

Analysis

Internal Workplace Harassment Claims Surge Amid #MeToo

Workers who experience harassment on the job have increasingly spoken up to their employers since the advent of the #MeToo movement in late 2017, according to a report released Thursday that provides a rare look at how the campaign has fared in the private sector.

Read full article »

Analysis

Trucking Cos. Hit Rough Patches In Calif. Classification Fights

Trucking companies are facing increasingly narrow legal avenues in their challenges to California's stringent worker classification standard as courts continue to reject claims that the Golden State's workplace regulations unduly burden motor carriers and undermine federal law, experts say.

Read full article »

3rd Circ. Hands J&J Win In Applicant's Background Check Suit

The Third Circuit sided with a Johnson & Johnson unit Thursday in a dispute with a former job prospect who claims an inaccurate criminal background check was used to reject him, finding a lower court erred when it denied Johnson & Johnson Services Inc.'s request to compel arbitration with the potential hire.

Read full article »

Biz Groups Seek 18 Months To Fork Over Pay Data To EEOC

The U.S. Chamber of Commerce and others told a D.C. federal judge Thursday their members need at least 18 months to gather workers' pay data for a recently reinstated U.S. Equal Employment Opportunity Commission survey, a day after the agency announced a September deadline.

Read full article »

Obese Bus Driver Wasn't Disabled, NJ Panel Says

A former Coach USA bus driver who weighs more than 500 pounds can't pursue a claim that he suffered hostile treatment at work because of his weight, a New Jersey state appeals court ruled Thursday. Saying his obesity didn't qualify as a disability, the court found that his employer never took any actions against him because of it.

Read full article »

11th Circ. Says No OT For Rich Products Delivery Drivers

The Eleventh Circuit on Thursday found a group of Rich Products Corp. delivery truck drivers weren't entitled to overtime pay under the Fair Labor Standards Act, saying the employees fell under an exemption to the law since the products they delivered crossed state lines before getting to them.

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DISCRIMINATION

Law360 Pro Say Podcast

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New Cases

Discrimination (34)
ERISA (29)
Labor (31)

LAW FIRMS

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Altshuler Berzon LLP
Bredhoff & Kaiser
Clark Hill
Cleary Gottlieb
Cohelan Khoury
Comegno Law Group
Cravath Swaine
Crowell & Moring
DLA Piper
Davis Polk
Debevoise & Plimpton
Dechert
Earthjustice
Edelson PC
Fernandez & Lauby
Foley Hoag
Fortney Scott
Fox Rothschild
Francis & Mailman
Girardi & Keese
Goulston & Storrs
Greenberg Traurig

Bellagio Owes Server $500K For 'Fat Andy' Sign, Jury Says

A Nevada federal jury on Wednesday awarded $500,000 to a former Bellagio Hotel & Casino restaurant server, finding the casino's refusal to remove a sign mocking him as "Fat Andy" despite his repeated requests caused him severe emotional distress.

Read full article »

Lack Of EEOC Quorum Bad For Biz, Chamber Tells McConnell

The U.S. Chamber of Commerce and 29 other business organizations are urging Senate Majority Leader Mitch McConnell to do everything in his power to get Trump administration nominee Janet Dhillon confirmed and restore a quorum at the U.S. Equal Employment Opportunity Commission.

Read full article »

WAGE & HOUR

PetSmart To Pay $2.4M To End Dog Groomers' Wage Suit

A California federal judge has given the initial OK to a $2.42 million deal to settle claims in two class action lawsuits that accused PetSmart Inc. of shorting more than 6,800 of its Golden State grooming salon workers on pay.

Read full article »

Walmart Metal Detectors Short Workers' Breaks, Jury Told

A former Walmart employee told a California federal jury Thursday she felt like a criminal going through a metal detector before leaving work, a time-consuming process she claims in her class action lawsuit discouraged workers from leaving the center for meal breaks.

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LABOR

DC Circ. Probes Court's Ability To Nix Trump's Labor Orders

Labor unions that successfully challenged three Trump administration executive orders on workers' protections faced a fresh test from the D.C. Circuit on Thursday, as the panel appeared skeptical that a lower court had jurisdiction to hear the case.

Read full article »

CWA, Medicare Call Center Settle Union-Busting Claims

The Communications Workers of America and a former Medicare and Affordable Care Act marketplace call center operator have agreed to a deal to end the union's claims that the company violated federal labor law by suppressing organizing campaigns at offices in Louisiana and Mississippi.

Read full article »

Unions Can't Take Dues From Ex-Members, NJ Teachers Say

A group of New Jersey educators have urged a federal court to overrule a state law that lets unions continue collecting dues from former members until an annual opt-out window rolls around.

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TRADE SECRETS

Don't Stock Up Your Biz With Our Workers, Campbell Warns

Campbell Soup is asking an Oregon state court for $30 million from the founder of Pacific Foods, an organic food company it bought for $700 million in 2017, claiming he’s illegally poaching employees for his new company.

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WHISTLEBLOWER

DOJ Must Explain FCA Dismissals, Judge Rules

Gunster
Hanson Bridgett
Jackson Lewis
Jenner & Block
Jones Day
Kaufman Dolowich
Kirkland & Ellis
Littler Mendelson
Locke Lord
Mayer Brown
McGuiness Yager
Morgan Lewis
Munger Tolles
Ogletree Deakins
Orrick Herrington
Parker McCay
Paul Hastings
Perkins Coie
Phillips Goldman
Pope McGlamry
Potter Anderson
Quinn Emanuel
Reed Smith
Reichman Jorgensen
Seyfarth Shaw
Simpson Thacher
Slaughter and May
Smyser Kaplan
Talcott Franklin
Tonkon Torp
Troutman Sanders
Weil Gotshal
Whittel & Melton
Willkie Farr
Winston & Strawn
Yoon Law
Zazzali Fagella

COMPANIES

Align Technology Inc.
Allergan PLC
Amazon.com Inc.
American Bankers Association
American Bar Association
American Federation of Government Employees
American Federation of State, County and Municipal Employees
American Federation of Teachers
Apple Inc.
BASF SE
Bellagio LLC
California Trucking Association

The U.S. Department of Justice must have a legitimate reason for dismissing whistleblower False Claims Act suits, a Pennsylvania federal judge said in a ruling that signals limits on the government's new spree of FCA dismissals.

Read full article »

2nd Circ. Says No Cut Of FCA Deal After Relator Suit Ended

The Second Circuit on Thursday rejected a whistleblower's bid for a cut of L-3 Technologies' $25.6 million False Claims Act settlement, finding that his related lawsuit wasn't pending at the time of the deal and that he wasn't coerced by the government into dropping the suit.

Read full article »

WORKER SAFETY

OSHA Sets Sights On Remington After Worker Severs Finger

The Occupational Safety and Health Administration has proposed slapping gun maker Remington with a $210,000 fine for exposing employees in an upstate New York plant to life-threatening hazards after a worker sliced off the tip of his finger while operating metal-cutting machinery.

Read full article »

BANKRUPTCY

Ditech Mortgage Holders Object To Planned Bonuses In Ch. 11

A class of Ditech Holding Corp. mortgage holders has asked a New York bankruptcy court to deny the company's request to pay out up to $30 million to unnamed "key employees," saying it believes the bonuses are part of a plan to hand control of the company to one group of creditors while leaving others in the lurch.

Read full article »

EXPERT ANALYSIS

5 Points Of Clarity On Evolving NLRB Doctrines

Five new advice memos from the National Labor Relations Board's Office of the General Counsel provide valuable insight into how the agency analyzes unfair labor practice allegations, including application of the board's Boeing test for evaluating work rules, say attorneys with Dechert.

Read full article »

What High Court's Expansion Of FCA Time Limits Would Mean

Questions from U.S. Supreme Court justices during last month's oral argument in Cochise Consultancy v. U.S. suggest the court will expand the statute of limitations for nonintervened False Claims Act cases, a ruling likely to pose significant practical challenges for companies defending against stale allegations, say attorneys at Crowell & Moring.

Read full article »

Book Excerpt

'Big Tech' Questions Echo Early Days Of US Corporate Law

The current calls to curb the power of Google, Facebook and Amazon recall an earlier time in American history, when the "bigness" of oil, steel and tobacco was front and center in national politics. And in those debates, the top lawyers of the day had a major voice, says John Oller, author of the new book "White Shoe."

Read full article »

LEGAL INDUSTRY

Millennial Lawyers Say Firm Model 'Fundamentally Broken'

While many millennial lawyers view partnership as their long-term career goal, more than half believe the law firm business model is "fundamentally

Campbell Soup Co.
Chevron Corp.
Citigroup Inc.
Communications Workers of America
Compass Minerals International, Inc.
Credit Suisse Group AG
Ditech Holding Corp.
DocuSign Inc.
Dynamex, Inc.
EMD Serono Inc.
EisnerAmper LLP
Facebook
Fannie Mae
FedEx Corp.
Freddie Mac
General Dynamics Corp.
General Electric Co.
General Motors
Google Inc.
Instagram Inc.
Intermountain Healthcare Inc.
Johnson & Johnson
Kelly Services Inc.
L3 Technologies Inc.
Law Finance Group Inc.
LendingClub Corp.
Liberty Mutual Insurance Group
Liggett Group LLC
MAXIMUS Inc.
MGM Resorts International
Major Lindsey & Africa
Massachusetts Mutual Life Insurance
Microsoft Corp.
NFL Enterprises LLC
National Association of Manufacturers
National Education Association
National Healthcare Corp
National Restaurant Association
National Retail Federation Inc.
National Treasury Employees Union
National Women's Law Center
Natural Resources Defense Council
New York Times Co.
Northwell Health Inc.
Oracle Corp.
Orexo AB
PayPal Inc.
PetSmart Inc.

broken," according to a survey published Thursday, which also found a wide disparity between male and female attorneys in whether they think shop culture is sexist.

Read full article »

In-House Attys Embrace Mansfield Rule To Hit Diversity Goals

Eight companies, including PayPal and Symantec Corp., have signed on to an in-house version of the Mansfield Rule that was publicly launched Thursday in an effort to increase the representation of women and minorities in top legal department roles and for outside counsel representation, aiming to build on the success of a similar program for law firms.

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Jenner, Munger Tolles Partners Inch Closer To 9th Circ. Seats

The Senate Judiciary Committee advanced two of President Donald Trump's choices for Ninth Circuit vacancies Thursday despite Democratic objections about their records and college-era writings.

Read full article »

Girardi, Lender Agree To Arbitrate 'Lavish' Lifestyle Dispute

Los Angeles trial attorney Thomas Girardi and Law Finance Group LLC agreed Thursday to arbitrate the legal loan company's claims that Girardi is living a "lavish" lifestyle while he and his firm owe more than $15 million that they borrowed to fund litigation.

Read full article »

Attys Back Texas Judge Who Accidentally Resigned In Letter

More than two dozen attorneys defended a Harris County, Texas, civil court judge who accidentally resigned after only three months by posting online about his intent to run for the state Supreme Court, blaming the confusion on the "peculiar structure of the Texas Constitution" in a public letter Thursday.

Read full article »

Legal Tech Download: New Discovery App, Compliance Tool

The world of legal technology is evolving quickly, with new products coming to market in rapid succession. Here, Law360 takes a look at six recent developments.

Read full article »

Law360's Weekly Verdict: Legal Lions & Lambs

Winston & Strawn kicks off this week's lions list with a favorable jury verdict for client Teva in a $41 million drug patent infringement suit, while Atlanta's Pope McGlamry ended up among the legal lambs after a judge slashed its fee request in a pro football player's concussion settlement.

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Review

Moving New Play Scrutinizes The Constitution's Failings

The new Broadway play "What The Constitution Means To Me" examines the limits of the nation's founding document, probing legal history and U.S. Supreme Court rulings to make a sobering case that the Constitution falls short of ensuring comprehensive rights for all Americans.

Read full article »

Pfizer Inc.
Remington Arms Co. LLC
Retail Industry Leaders Association
Rich Products Corp.
Seal Software Ltd.
Service Employees International Union
Symantec Corp.
Teva Pharmaceutical Industries Limited
The ADT Corp.
The Boeing Co.
U.S. Bancorp
U.S. Chamber of Commerce
UCB SA
Ultimate Fighting Championship Ltd.
United States Steel Corp.
Wal-Mart Stores Inc.
Walt Disney Parks & Resorts Worldwide Inc.
eBay Inc.

GOVERNMENT AGENCIES

Army Corps of Engineers
California Supreme Court
Equal Employment Opportunity Commission
Executive Office of the President
Federal Aviation Administration
Federal Bureau of Investigation
Federal Labor Relations Authority
Library of Congress
National Labor Relations Board
New Jersey Attorney General's Office
New Jersey Supreme Court
Occupational Safety and Health Administration
Occupational Safety and Health Review Commission
Texas Secretary of State
U.S. Attorney's Office
U.S. Department of Justice
U.S. Department of Labor
U.S. Department of Transportation
U.S. Patent and Trademark Office
U.S. Senate
U.S. Supreme Court
United Nations
United States Bankruptcy Court for the Southern District of New York
United States Court of Appeals for the Third Circuit
United States District Court for the Eastern District of Pennsylvania

New York, New York

Associate Attorney
O'Hagan Meyer
Newport Beach, California

Labor & Employment Associate
McGuireWoods LLP
-, -

Labor & Employment Associate
McCarter & English, LLP
-, -

From: GovExec Today
To: Ring, John
Subject: House Dems don"t want any money for OPM reorg; FBI director touts record job applications
Date: Friday, April 5, 2019 5:34:56 AM

GovExec Today

April 5, 2019

House Democrats Recommend Zero Money for OPM Reorganization // Erich Wagner

House Oversight Committee Democrats urged appropriators to effectively block an effort to merge the Office of Personnel Management with the General Services Administration.

FBI Director Touts Record Job Applications Despite Bashing of Bureau // Charles S. Clark

Wray acknowledges Trump budget cuts, declines to respond to political jabs.

De-Stressing the Retirement Process // Tammy Flanagan

Take a deep breath and understand the key steps.

Judges Fixate on Jurisdictional Question in Appeal of Decision Invalidating Trump Workforce Orders // Erich Wagner

The Justice Department has argued that federal employee unions' efforts to unravel a series of workforce executive orders must first go through the Federal Labor Relations Authority.

Staffing Shortages Impede State Department Monitoring of War-Zone Contracts // Charles S. Clark

Watchdog finds several bureaus allowed questionable invoices to go through.

'Dozens' of Whistleblowers Are Secretly Cooperating With House Democrats // Russell Berman

The number of anonymous tipsters reporting wrongdoing from inside the federal government has spiked during the Trump presidency, the House Oversight Committee says.

Analysis: Congressional Oversight Is at the Heart of America's Democracy // Derek W. Black

The Constitution gives Congress the power over the executive branch, which it's free to flex.

How Ex-Congressman Jeff Miller Is Single-Handedly Shaping The Push To Privatize VA Health Care // Jasper Craven

Behind Miller's growing lobbying portfolio lies one of the biggest unexamined shifts in Washington's influence game.

114 Lawmakers Push to Fund Clean Energy Research // Jack Corrigan

The group wants $500 million for the Energy Department's advanced research projects agency, which would be eliminated under the White House's 2020 budget request.

Church Scores Federal Court Win in Zoning Dispute With Village // Bill Lucia

The case involved religious discrimination claims and attracted the attention of the Justice Department.

Senate Bill Promises Retaliation If Russia Again Meddles in Elections // Frank Konkel

The bill would force the U.S. to sanction Russian industries.

Oklahoma Tries New Strategy and New Target in Opioid Lawsuit // Christine Vestal

The state recently agreed on a big settlement with Purdue Pharma and now wants Johnson & Johnson to disclose opioid marketing documents.

Government Executive Media Group, 600 New Hampshire Avenue NW, Washington, DC 20037

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Pay Data Collection Divides Employers, Worker Advocates
Date: Friday, April 5, 2019 7:09:10 AM

What you need to know to start your day.

Pay Data Collection Divides Employers, Worker Advocates

By Patricio Chile

The divide between employer groups and worker advocates is widening as a deadline for employers to turn over pay data to the Equal Employment Opportunity Commission sits on the table. Employer groups are filing briefs and sending letters to delay—or even attempt to block altogether—the pay data collection, but worker advocates say the issues have already been resolved in court.

- **Delay Sought:** Prominent lobbying groups like the **U.S. Chamber of Commerce** and the **HR Policy Association** say the collection would be too burdensome and too expensive and are asking for at least 18 months before the rule takes effect.

- **Lingering Uncertainty:** The judge has the final say of whether the deadline will be Sept. 30—and there's always the possibility of more litigation from either side, Paige Smith and Hassan Kanu report.

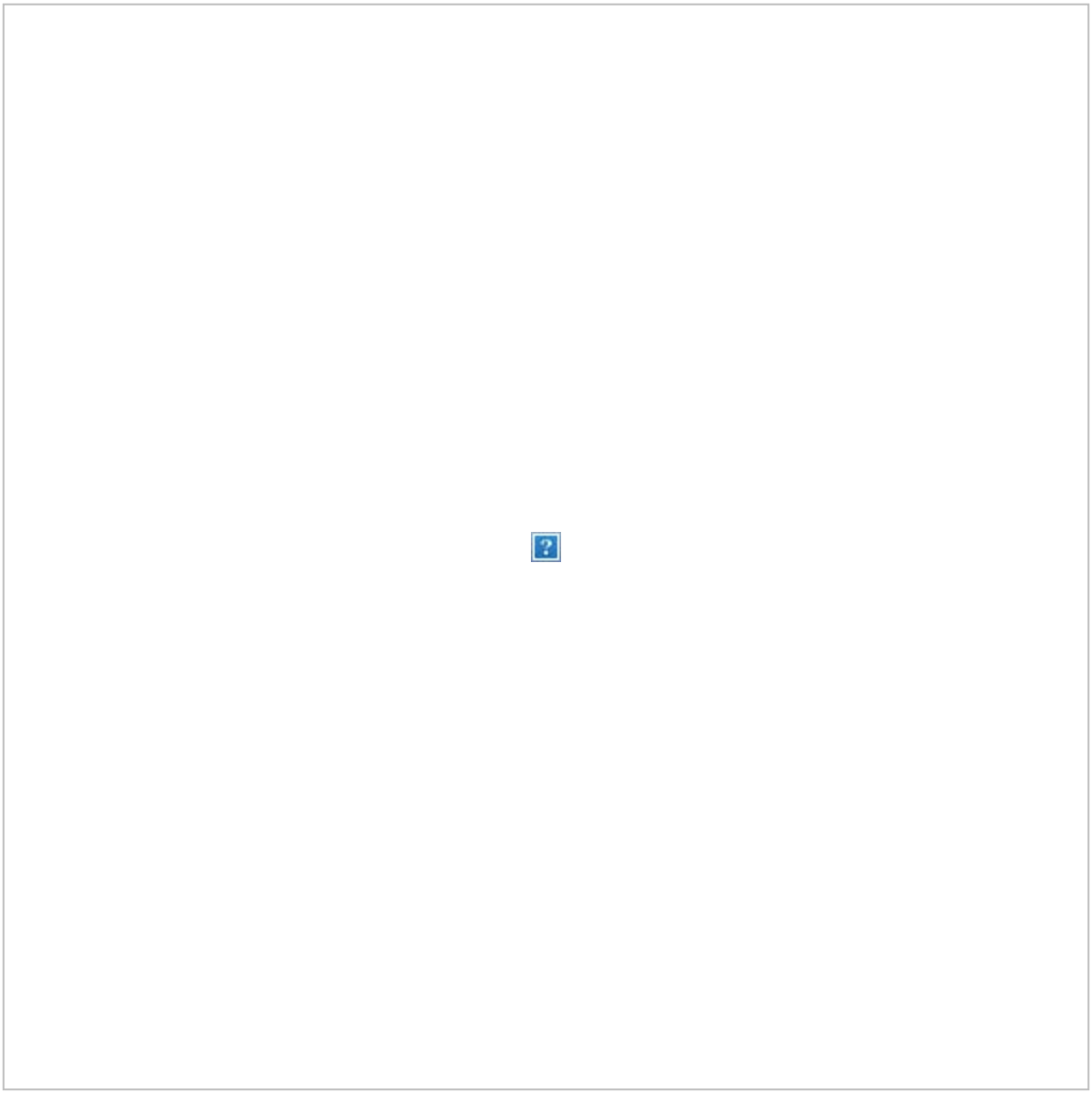
MORE TRUMP PICKS EN ROUTE TO NINTH CIRCUIT

The appeals court that President Donald Trump has vilified is closer to having

two more of his nominees seated there.

- **Firm Partners: Jenner & Block** partner Kenneth Lee and **Munger, Tolles & Olson** partner Daniel Collins are awaiting Senate votes on their nominations to the **Ninth Circuit,** after they cleared the Senate Judiciary Committee on the same day that the Senate confirmed Roy Altman to the U.S. District Court for the Southern District of Florida.

- **Blue Slip Battle:** Dianne Feinstein (D-Calif.) said the nominees shouldn't have received **committee votes** because they lacked "blue slip" approval, but Sen. Lindsey Graham (R-S.C.) quoted her 2001 remarks opposing the tradition, under which nominees can be blocked by senators from their home state. Patrick Gregory has the story.



The U.S. Court of Appeals for the Ninth Circuit is based at the James R. Browning U.S. Courthouse in San

Francisco.
David Paul Morris/Bloomberg via Getty Images

WHAT ELSE WE'RE WATCHING

- **Wage and Hour:** The Senate is set to vote next week on South Carolina lawyer **Cheryl Stanton's nomination** to run the Labor Department's Wage and Hour Division.

- **Immigration Topics:** A U.S. Chamber of Commerce event today will cover several key immigration issues, including legal status for **Dreamers** and **Temporary Protected Status** holders, the impact of administrative actions on business, and new ideas for overhauling the immigration system.

- **Legal Expansion:** In the wake of **Ernst & Young's** purchase of Reuters' managed legal services arm, **Pangea3,** EY's top legal division official says his Big Four company is now "probably the leading alternative law provider globally."

- **Regulations Suit:** California, Oregon, and Minnesota have sued President Donald Trump and several top cabinet officials over the administration's requirement that federal agencies delete **two regulations** for each new one they add.

- **Union Elections:** The National Labor Relations board plans to roll out this spring proposed changes to **union election rules**, Robert Iafolla reports.

- **Federal Workforce:** A three-judge panel appeared skeptical during a hearing of arguments from the Trump administration that they should overturn a lower court's ruling striking down portions of **three executive orders** affecting the federal workforce. Louis LaBrecque has the story.

- **HR Buzz:** Businesses are **struggling to succeed** as they find themselves caught between two challenges: "technological disruption" and dramatic "cultural, demographic and societal shifts," a new report finds. Read more in this week's HR Buzz.

- **Unemployment Numbers:** The Bureau of Labor Statistics releases its March **unemployment** and **payrolls** report at 8:30 a.m.

DAILY RUNDOWN

Top Stories

Validity of Coca-Cola Bottler's Arbitration Pact Up to Jury
A jury must decide whether a maintenance mechanic at a Coca-Cola bottling plant in Texas needs to arbitrate his job bias claims, a federal judge ruled.

General Dynamics Settles Dispute With Medicare Call Center Staff
A General Dynamics Corp. subsidiary agreed to settle claims that the federal contractor threatened workers trying to unionize Medicare and Obamacare call centers.

Revenge or #MeToo: Firing Exposes Rift at Rights Icon Amnesty
A former advocacy director for Amnesty International USA is challenging his firing that occurred just months after the human-rights organization threatened retaliation against him for helping to organize a petition by unpaid interns. A federal administrative judge concluded last month that those threats violated U.S. labor law.

Discrimination

Lactating Worker May Not Have Settled Her Job Bias Claims
A Texas woman can pursue a lawsuit alleging her employer discriminated and retaliated against her when she returned from maternity leave and took lactation breaks, a federal judge ruled.

Arbitrator Must Rule on Validity of Disability Claims
Whether a Missouri worker must arbitrate his disability discrimination claims must be decided by an arbitrator, the state court of appeals ruled.

Wage & Hour

Sun-Maid Worker's Break Suit Straddles State, Federal Courts
Attorneys for Sun-Maid Growers of California and a worker who claims the company failed to provide meal and rest breaks are battling over whether the worker's claim will be heard in state or federal court.

Judge Swats Away Bimbo Bakeries' Defense Moves in OT Suit
Bimbo Bakeries USA Inc. lost its bid to pursue an unjust enrichment counterclaim against a group of delivery drivers who say the company

misclassified them as independent contractors and owes them overtime compensation.

Harassment & Retaliation

Apache Corp. Paralegal Has Age, Sex-Based Retaliation Win Upheld
Evidence supports a state jury's finding that Apache Corp. retaliated against a paralegal because she complained about sex and age discrimination at the Houston-based oil and gas company, the Texas Court of Appeals ruled.

State & Local Laws

Gender Wage Gap Targeted as Colorado Senate Passes Pay Bill
The Colorado Senate approved a bill taking aim at gender-based pay disparities.

California 'Walk Time' Case Arguments: To Pay or Not to Pay
California Supreme Court justices sounded skeptical of arguments by the state that lawmakers intended for thousands of state correctional workers to go unpaid for the chunk of time it takes them to walk from the prison doors to their assigned posts.

Labor Relations

Justices Urged Not to Review Minnesota Union Representation Cases
Minnesota Attorney General Keith Ellison called on the U.S. Supreme Court to deny review of litigation involving unions' authorities to provide exclusive representation for public-sector bargaining units.

Immigration

ICE Raids Texas Company, Arrests 280 Undocumented Workers
More than 280 people were arrested on administrative charges of working unlawfully at a telecommunications equipment repair business in north Texas April 3.

WORKFLOWS

Dickinson Wright announced that Donald R. McPhail has joined the firm's IP litigation team as a member in Washington | **Mayer Brown** said that Tram Nguyen has joined its corporate and securities practice as a partner in Washington and New York from Paul Hastings | **King & Spalding** added

Bernhardt Nadell as a partner in its corporate, finance and investments practice in New York from Stroock | **Vedder Price's** Chicago office added bankruptcy shareholder David Kane from Meltzer Purtill & Stelle | **Levenfeld Pearlstein** hired veteran banking and restructuring lawyer Harold D. Israel as a partner in Chicago | **McGuireWoods** announced the arrival of Thomas DeSplinter as a partner to its M&A, Private Equity Groups in Chicago from Winston Strawn | **O'Melveny** hired SEC senior counsel William Martin to the White Collar Defense & Corporate Investigations practice in New York | **Jackson Lewis** appointed Jana Simon as the firm's first director of the Diversity & Inclusion Committee in New York | **Squire Patton Boggs** said that Joe Alonzo has joined as partner in the global Litigation Practice in New York from DLA Piper.

For all of today's Bloomberg Law headlines, visit Daily Labor Report

From: Nixon-Jackson Thetis
Subject: Legal News FYI 04-05-19
Date: Friday, April 5, 2019 9:25:32 AM

Friday, April 5, 2019

Proposed NLRB Election Rule Changes Expected This Spring

BloombergLaw - Daily Labor Report 05 Apr 2019 07:27

• Proposal will address two separate election policies • NLRB already working on 'joint employer' rulemaking By Robert Iafolla The National Labor Relations Board aims to release proposed changes to its rules for union elections sometime this spring, the...

Pay Data Collection Divides Employers, Worker Advocates

BloombergLaw - Daily Labor Report 05 Apr 2019 07 06

By Patricio Chile The divide between employer groups and worker advocates is widening as a deadline for employers to turn over pay data to he Equal Employment Opportunity Commission sits on he table. Employer groups are filing briefs and sending...

DOL proposes employer-friendly rules for regular pay rate definition, joint employer liability

Oklahoman (Oklahoma City, OK) 05 Apr 2019 06:07

The Department of Labor recently went on a rulemaking frenzy, making proposed changes to wage and hour laws that hadn't been touched in more than 50 years. Why now? The DOL has been very active in the past couple of weeks. Last month, the DOL issued...

Department of Labor Proposes Update to Joint Employer Regulations

Frost Brown Todd News 04 Apr 2019 22:47

The Department of Labor ("DOL") recently announced it is proposing a rule to clarify and revise the regula ions interpreting joint employer status under the Fair Labor Standards Act ("FLSA"). Generally, the FLSA requires employers to pay employees at...

Judge rejects FirstEnergy's plan to get rid of environmental liabilities in subsidiary's bankuptcy

Pittsburgh Post-Gazette (Pittsburgh, PA) 04 Apr 2019 19:53

FirstEnergy Corp. and its bankrupt subsidiary FirstEnergy Solutions hit a major snag in their plan to trade future environmental liabilities for several billion dollars to recapitalize the bankrupt power generation firm. A federal bankruptcy judge called...

Deputy Lawyer; WGA Tries Preemption Route in ATA Dispute

National Law Review 04 Apr 2019 17:00

The ongoing dispute between the Writers' Guild of America ("WGA") and the Association of Talent Agencies ("ATA") took a new turn recently when the WGA announced that it would use the authority granted to it under the National Labor Relations Act ("NLRA")...

Can You Terminate An Employee For Facebook Posts Criticizing Your Company?

National Law Review 04 Apr 2019 16:44

Article By Disciplining an employee for social media posts criticizing a company can be a tricky area to navigate from a legal standpoint. The National Labor Relations Board (NLRB) has been aggressive in terms of ordering the reinstatement of workers...

NLRB: Employer's Reasons For Policy Changes Kept Union's Information Request Alive Even After Proposals Withdrawn

National Law Review 04 Apr 2019 15:11

Information requests in the realm of labor relations are simple in heory but can be complicated in practice. We have seen how the topics of information sought by a union can cause skirmishes, sometimes deliberately so. We also have seen that it almost...

General Dynamics Settles Dispute With Medicare Call Center Staff (2)

BloombergLaw - Health Law & Business News 04 Apr 2019 12:36

• Management agrees to inform workers of union rights • Company skirts federal labor violation through settlement By Madison Alder and Chris Opfer A General Dynamics Corp. subsidiary April 4 agreed to settle claims that the federal contractor hreatened...

WashU Expert: New labor laws would strengthen unions, fight income inequalities

Washington University in St Louis (St Louis, MO) 04 Apr 2019 10:22

New legislation designed to reverse a decades-long decline in worker's rights under he National Labor Relations Act could play a critical role in reducing the growing income gap between rich and poor in America, according to the recent congressional...

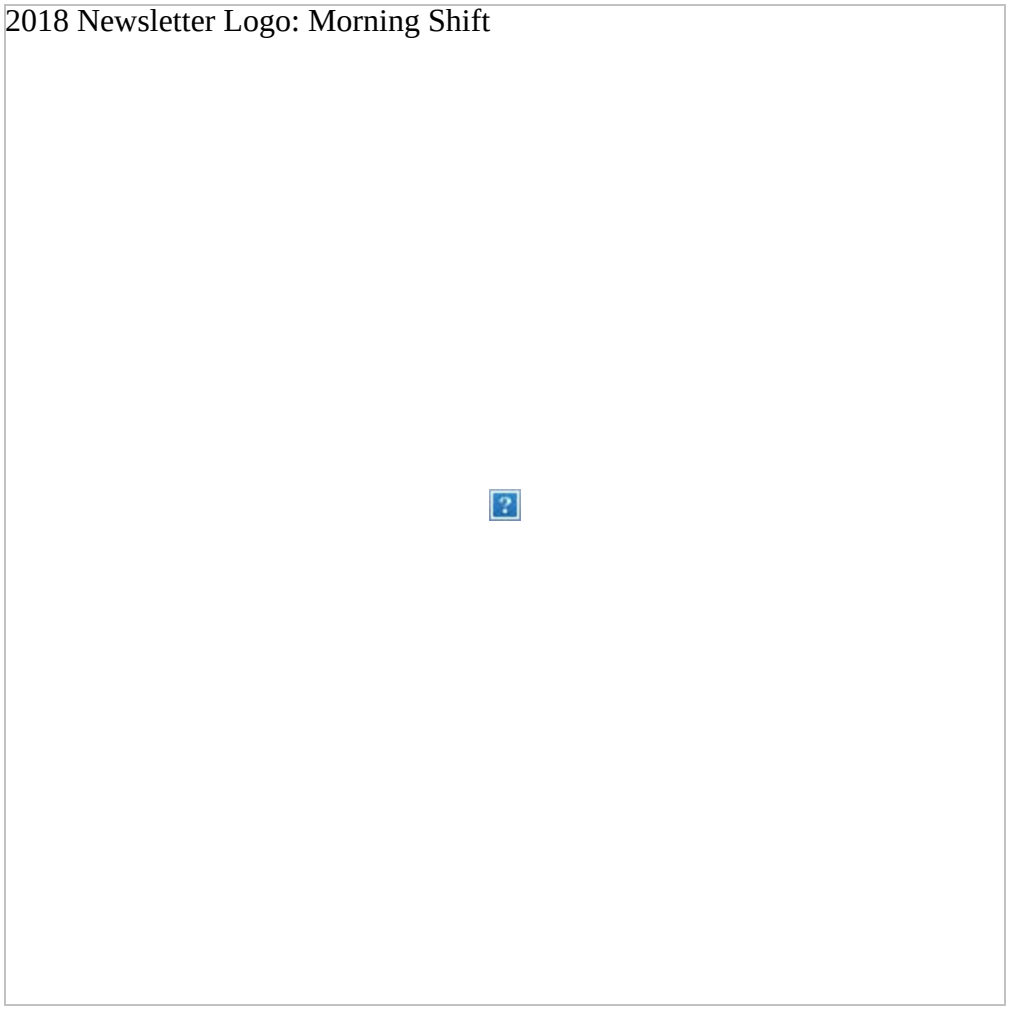
Blog Post: 5 Points Of Clarity On Evolving NLRB Doctrines

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 04 Apr 2019 08:06

Five new advice memos from the National Labor Relations Board's Office of the General Counsel provide valuable insight into how the agency analyzes unfair labor practice allegations, including application of the board's Boeing test for evaluating ...read...

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Trump backs down on closing the border — Sustained robust wage growth predicted — Red state Democrats propose regional wage minimums
Date: Friday, April 5, 2019 10:03:32 AM

View online version



04/05/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— Trump backed down on closing the border.

— Economists predict sustained robust wage growth.

— Red state House Democrats proposed regional wage minimums.

HAPPY FRIDAY! Good morning, it's April 5, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

TRUMP WON'T CLOSE BORDER: President Donald Trump walked back his threat to shut down the U.S.-Mexico border Thursday, letting Mexico off with a "one-year warning," POLITICO's Caitlin Oprysko reports . "The only thing frankly better, but less drastic than closing the border, is to tariff the cars coming in," the president told reporters at the White House Thursday. Trump's reason for weighing a border closure shifted over the past week; he started out saying it was to halt the flow of migrants, but ended up saying it was to halt the flow of drugs. Whatever the reason, Republicans and the business community were no fonder of the idea than Democrats, and they urged him not to go through with it. POLITICO's Sabrina Rodriguez reports that Jesús Seade, Mexico's undersecretary for North America, said at a press conference Thursday, "We are not concerned" about the auto tariffs that Trump threatened.

The Chamber of Commerce "welcomed the move" and called on Congress to give CBP sufficient funding to "reduce the excessive wait times affecting legitimate trade and travel across the border." Nielsen and Trump head to Calexico, Calif., today. More here.

Related: "Trump's right: Border arrests are surging. Here's why." from POLITICO's Ted Hesson

DEMS SUE OVER BORDER FUNDING: "Speaker Nancy Pelosi announced Thursday that the House will file a lawsuit to challenge President Donald Trump's emergency declaration on the southern border," POLITICO's Sarah Ferris reports .

The move comes after the House was unable to override a presidential veto of a bill to halt the emergency declaration. "The President's action clearly violates the Appropriations Clause by stealing from appropriated funds, an action that was not authorized by constitutional or statutory authority," Pelosi wrote in a statement.

JOBS REPORT

IT'S JOBS DAY: Economists surveyed by Econoday predict BLS will report this morning that 170,000 new jobs were created in March, following a mere 20,000 created in February. They also forecast unemployment to remain 3.8 percent. February's 20,000 job-growth figure was the smallest monthly gain in nearly year and a half, and it contrasted pretty starkly with the 311,000 jobs added in January.

But Morning Shift is a lot more interested in wages, which rose 3.4 percent in February over one year earlier. That was the biggest one-month hike since April 2009. Econoday's analysts predict March wage growth to be the same. If that's right, then the brisk wage growth long predicted in this tight labor market has really and truly arrived. At 8:30 a.m. you can find BLS's March jobs numbers here.

WAGES

REGIONAL WAGE BILL: A group of Democrats led by Rep. Terri Sewell of Alabama introduced a bill Thursday that would create "regional" wage minimums based on the local cost of living, deepening a rift within the caucus about raising the minimum nationwide to $15, POLITICO's Sarah Ferris reports. Under the proposal, every metro area would be grouped into one of five wage-minimum tiers based on the Bureau of Economic Analysis's cost of living data. These regional minimums would be adjusted "based on increases in the average hourly wage of private sector, non-supervisory workers." Sewell's bill would increase the hourly minimum wage in smaller cities to a projected $12.10 by 2024, compared to big cities like New York City, which would reach a projected $15.10 by 2024.

"The only tangible impact of this proposal would be to set minimum wages less than $15 throughout every part of the country that hasn't already passed a $15 minimum wage, or isn't actively considering it," the left-leaning Economic Policy Institute's Heidi Shierholz wrote in a blog post. Mary Kay Henry, president of the Service Employees International Union which backs the Fight for $15 movement, said in a written statement that "allowing different regions to set their own wage floors would simply perpetuate the same regional and racial disparities that have

locked workers in those states in poverty wages."

The International Franchise Association told Morning Shift that it found the Sewell bill "refreshing," but that "businesses need predictability in order to plan for their future and many of the components of this bill, particularly automatic increases, are problematic for local franchise small business owners." More on the bill here.

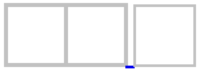
IMMIGRATION

POT PROBLEMS FOR LEGAL IMMIGRANTS: "Officials are warning legal immigrants that working in Colorado's marijuana industry could jeopardize their legal status, after two people said they were denied U.S. citizenship because of their jobs," the Associated Press reports. "Attorneys representing the two legal immigrants from Colorado and Denver officials accused the Trump administration of quietly targeting immigrants seeking to work in the expanding field."

Although marijuana is illegal federally, 33 states, the District of Columbia, Guam, and Puerto Rico have legalized marijuana, most for medical use, and 10 states and the District of Columbia permit recreational use as well. Deborah Cannon, a spokeswoman for U.S. Citizenship and Immigration Services, explained to the AP that "when adjudicating applicants for citizenship, the agency is required to apply federal law."

"Even if you have had a green card for 20 years, you had better not work in any aspect of this industry and you better not use marijuana," Kathy Brady, a senior staff attorney with the Immigrant Legal Resource Center told the AP. More here.

NEXT WEEK



Wage theft: A House labor appropriations subcommittee will hold a hearing Tuesday on combating wage theft. Rep. Rosa DeLauro (D-Conn.) who chairs the subcommittee, told POLITICO last year that her agenda this Congress would focus on "making sure workers are not taken advantage of by enhancing enforcement actions against wage theft and upholding minimum wage laws and overtime laws—including those that cover federal contractors." POLITICO's Marianne LeVine documented last year that state-level enforcement of wage and hour laws is weak to nonexistent. More on the hearing here.

LGBT protections: A House Education and Labor subcommittee will hold a hearing at 2 p.m. Tuesday on the Equality Act, H.R. 5 (116), which aims to prevent discrimination based on sex, sexual orientation or gender identity. More on that from The Hill here.

Family separations: A House oversight committee will hold a business meeting Tuesday afternoon on the "failure" of the Trump administration to comply with subpoenas concerning the separation of migrant families at the border. More on the subpoenas here; and more on the meeting here.

SBA lending: On Wednesday, a Small Business subcommittee will examine the impact of fee changes on the Small Business Administration's 7(a) Loan Guaranty Program, which backs more than 60,000 small business loans. Find more info here.

Wage and Hour confirmation vote: Senate Majority Leader Mitch McConnell filed cloture Thursday on the nomination of Cheryl Stanton to be Wage and Hour Division administrator, teeing up a full Senate vote on the nominee next week.

Hartogensis confirmation vote: The Senate HELP Committee will vote Tuesday on the nomination of Gordon Hartogensis for director of the Pension Benefit Guaranty Corporation. Hartogensis (whose brother-in-law is Senate Majority Leader Mitch McConnell) was cleared by the Senate Finance Committee late last month. He has no government experience, he hasn't held a job since 2011, and he is expected to be confirmed. The vote will take place off the floor. More info here.

ICE Director confirmation vote: On Thursday the Judiciary Committee will hold an executive business meeting to vote on the nomination of Ronald Vitiello to become director of Immigration and Customs Enforcement. Vitiello's nomination

was cleared by the Senate Homeland Security and Governmental Affairs Committee last month , but not without drama. His vote was delayed twice after the National ICE Council, a union that represents officers, opposed Vitiello's nomination based on his performance as acting director and past comments on social media. The meeting takes place in 226 Dirksen at 10 a.m.

COFFEE BREAK

— "Homeland Security Staffers Were Warned Not To Leak Information Or Face Legal Consequences," from BuzzFeed

— "Mexican leader promises passage of labor reforms key to USMCA ratification," from POLITICO

— "Miami's airport is removing automatic tips. Restaurant workers say wages will plummet," from The Miami Herald

— "Walmart, Other Employers Get Choosier About Workers' Doctors," from The Wall Street Journal

— "Manufacturing Surge, a Boon for Trump, May Be Fading," from The New York Times

THAT'S ALL FOR MORNING SHIFT!

View online

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Friday, April 5, 2019 4:33:33 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

J&J Worker May Have to Arbitrate Under Kelly Services' Pact

By Patrick Dorrian

Johnson & Johnson may be able to force a worker it briefly employed through Kelly Services to arbitrate his class claims under the Fair Credit Reporting Act, the Third Circuit ruled.

Bias Trial for Worker With Mobility Issues Still a Go

By Patrick Dorrian

The Fourth Circuit won't reconsider whether the EEOC has enough evidence to show that traveling between job sites really wasn't an essential duty for a worker with mobility issues

Proposed NLRB Election Rule Changes Expected This Spring

By Robert Iafolla

The National Labor Relations Board aims to release proposed changes to its rules for union elections sometime this spring, the agency said.

Mass Exodus of Public Union Fee Payers After High Court Ruling

By Robert Iafolla

Two major public sector unions lost nearly 210,000 agency fee payers combined in 2018, according to recently filed reports showing the impact of a U.S. Supreme Court decision that prohibits forcing nonmembers to pay for collective bargaining and other nonpolitical expenses.

DISCRIMINATION

Hope Solo's Unequal Pay Suit May Not Be Solo for Long (1)

By Porter Wells and Genevieve Douglas

Superstar goalie Hope Solo's pay discrimination lawsuit against the U.S. Soccer Federation Inc. is on hold until a separate federal panel decides whether to combine her claims with those brought by her teammate, Alex Morgan.

Winn-Dixie Employee Not Fired for Taking Pregnancy Leave (1)

By Bernie Pazanowski and Erin Mulvaney

Varonica Udeh said the timing of her firing from Winn-Dixie was suspicious: The in-store coordinator was terminated six weeks and a day after she began her pregnancy leave. Yet, the store argued she was fired when she failed to show up for several shifts.

State Ties Help Denver Health Win Partial Immunity in Bias Suit

By Porter Wells

The Denver Health and Hospital Authority will have to continue to defend against some of the sex-orientation discrimination claims a former human resources manager brought against it, the Colorado Court of Appeals said April 4.

WAGE & HOUR

Timber Firm Gets Partial Win in Overtime Calculation Dispute

By Porter Wells

A Michigan timber-harvesting enterprise will get another chance to debate how much it owes its workers in unpaid overtime, the Sixth Circuit said April 5.

HARASSMENT & RETALIATION

Obese Bus Driver Fails With Disability Harassment Claim

By Patrick Dorrian

An obese Coach USA driver can't show he was subjected to a hostile work environment because he was perceived to be disabled, a New Jersey appeals court ruled.

Microsoft Vows to Focus on Gender Harassment Amid Uproar

By Dina Bass

Microsoft Corp.'s top executives pledged to discuss diversity and harassment issues at monthly employee meetings after complaints about sexual misconduct and discrimination against women erupted in a 90-page email thread at the software maker.

LABOR RELATIONS

Phillips 66 Paid Leave Suit Should Be Booted, Steelworkers Say

By Jacklyn Wille

A United Steelworkers local union wants to jump into a lawsuit asking whether Phillips 66 Co. has to provide workers with paid family leave through its disability benefit plan.

NLRB

Sysco Subsidiary Evades Bargaining Order for Union Busting

By Robert Iafolla

A Michigan-based subsidiary of multinational food distributor Sysco Corp. won't have to recognize and negotiate with a union despite the company's widespread labor law violations prior to an election, the NLRB said in a ruling that canceled its earlier bargaining order.

NLRB Weekly Summary of Cases, Dated March 25-29, 2019

Summary of NLRB Decisions for Week of March 25-29, 2019

LEGAL PROFESSION

College-Scam Lawyer Apologizes to Daughter, to Plead Guilty (4)

By Patricia Hurtado

The former co-chair of Willkie Farr & Gallagher -- one of the highest-profile parents nabbed in a U.S. college-admissions scandal -- will become the second to plead guilty in the case.

IMMIGRATION

Immigration Groups Ask Fortune 500 CEOs to Blacklist Trump Aides

By Jennifer Epstein

Immigration and civil rights groups are urging companies not to hire senior Trump administration officials who were involved in planning, carrying out or defending the separation of migrant children from their parents.

HEALTH CARE & BENEFITS

Envision Healthcare Worker Says 401(k) Contributions Are Missing

By Jacklyn Wille

Envision Healthcare Corp. is accused in a proposed class action of mishandling workers' retirement plan contributions.

Union Worker's Suit Over Pension's $73M Underfunding Falters

By Jacklyn Wille

A union worker's lawsuit challenging his pension plan's $73 million underfunding should be dismissed, a federal magistrate judge said.

Perks of Work: From Time Served to Bright Futures

By Warren Rojas

Time for Perks of Work, our weekly recap of intriguing data, surveys, and trends about the 21st century workplace.

HUMAN RESOURCES

HR Buzz: Businesses Who Need People • Where There's Smoke

By Cathleen O'Connor Schoultz

Sure, sure, people are our most important asset and all that, but do company's actions always match up to the slogans? On another front, a new report based on a million-plus employee reports shows that sexual harassment reports are up 18 percent. That and more in this week's HR Buzz.

ALSO IN THE NEWS

Pay History Case Sent Back to Ninth Circuit Gets New Judge

By Jay-Anne B. Casuga

A federal appeals court in San Francisco selected a replacement for the late Judge Stephen Reinhardt in a case that asks whether companies may use workers' salary histories to set starting pay.

U.S. Payrolls Top Estimates With 196,000 Rise, Wage Gains Ease

By Katia Dmitrieva

U.S. hiring rebounded more than forecast in March and the prior month was stronger than first reported, potentially relieving some concerns about a cooling

economy. Wage gains eased and the unemployment rate held near a 49-year low.

Shale Driller Pioneer Natural Cuts Workforce to Lower Costs (1)

By Kevin Crowley

Pioneer Natural Resources Co. plans to eliminate jobs, extending cuts that slashed the oil explorer's headcount by almost one-fourth in the past five years.

PRACTITIONER INSIGHTS

INSIGHT: Storytelling and Stick Figures—How to Present Expert Testimony in Litigation

Nutter McClennen & Fish LLP partner David L. Ferrera addresses key considerations when preparing expert witnesses in a mass tort litigation, including how to effectively explain complex scientific concepts to a lay jury, preparing trial exhibits that resonate, and special skills that can bring your evidence to life.

LATEST CASES

Case: Individual Employment Rights/Arbitration (3rd Cir.)

Johnson & Johnson Services may be able to compel arbitration of the putative Fair Credit Reporting Act class action of a temporary employee who was provided by Kelly Services to fill an operations supervisor position at J&J and was rejected based on a consumer credit report that was part of his background check, even though J&J is not a signatory to an arbitration agreement the employee had with Kelly. A party may be equitably estopped from resisting arbitration under either Michigan or Pennsylvania law, the 3rd Circuit said, vacating a district court order and remanding for an arbitrability determination. The case is Noye v. Johnson & Johnson Services, Inc., 2019 BL 121021, 3d Cir., 18-2197, 4/4/19.

Case: Disability Discrimination/'Disability' (N.J. Super. Ct. App. Div.)